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NO.

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1988

OLYMPIA ROOFING COMPANY, AND OLYMPIA COMPANY, INC., ET AL
Petitioners

v.

THE CELOTEX CORPORATION, STANDARD-TAYLOR INDUSTRIES, INC., STANDARD ROOFING COMPANY OF NEW ORLEANS, INC., ROBBINS TAYLOR, AND PIERRE F. CARRIERE, ET AL
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 89-3181

USDC #CA 76-373-A

ORIGINAL PETITION FOR WRIT OF CERTIORARI

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Petitioners

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QUESTIONS PRESENTED FOR REVIEW

Petitioner has lodged two Writs of Certiorari relative to primary judgment of United States District Court, Eastern District of Louisiana, CA No. 76-373A:

a) First Writ of Certiorari relates to judgment rendered by U. S. Court of Appeals for the Fifth Circuit, No. 84-3850;

b) This second Writ of Certiorari relates to judgment rendered by U. S. Court of Appeals for the Fifth Circuit, No. 89-3181.

1. Has Court of Appeals for the Fifth Circuit ignored the notice of judiciary violations of constitutional guarantees claimed by petitioners, Olympia Roofing Company and Olympia Company, Inc. (herinafter disignated "Olympia") and W. J. Manion (hereinafter designated "Mr. Manion")?

2. Has Court of Appeals for the Fifth Circuit used imposition of sanctions on two occasions to discourage and intimidate petitioners to cease and desist urging judiciary violation of constitutional guarantees?

3. Has Court of Appeals for the Fifth Circuit ignored Erie Doctrine by failing to be guided by Louisiana law applicable to this request for Writ of Certiorari as set forth in *Guille v. Dept. of Transp. & Dev.*, 538 So.2d 1144 (La.App. 5 Cir. 1989); *Versailles Arms Apts. v. Gunderson*, 377 So.2d 1359 (La.App. 4 Cir. 1978)?

4. Questions presented for review submitted in brief opposing Court of Appeals for the Fifth Circuit judgment, No. 84-3850, are re-urged in this instance as if ser forth in-extenso.

LIST OF PARTIES

Pursuant to Supreme Court Rules 21.1(b) and 28.1, counsel for the Petitioners certifies that the following list of persons or corporations either have an interest in the outcome of this case or were parties to the proceeding in the Court whose judgment is sought to be reviewed.

Petitioners/Plaintiffs/Appellants

1. Olympia Company, Inc.
2. Olympia Roofing Company

Non-Party/Petitioners' Counsel

3. W. J. Manion

Respondents/Defendants/Appellees

4. The Celotex Corporation
5. Standard-Taylor Industries, Inc.
6. Standard Roofing Company of New Orleans, Inc.
7. Robbins Taylor
8. Pierre F. Carriere

OTHERS

9. Johns-Manville Sales Corporation
10. Clerk, U.S. Civil District Court, Eastern District of La.
11. Clerk, U. S. Court of Appeals for the Fifth Circuit
12. Hon. Charles Schwartz, Jr.
13. Jack N. Price

W. J. MANION,
individually and attorney of
record for Olympa Roofing Company, Olympia Company, Inc.,
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I.

The petitioners, Olympia Company, Inc., Olympia Roofing Company, and their undersigned counsel, W. J. Manion, respectfully pray that a Writ of Certiorari issue to review the final order of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled proceedings on May 12, 1989 (Appendix *H*)

JUDGMENTS AND OPINIONS BELOW

Motion and Order for New Trial of CA No. 76-373A in United States Court, Eastern District of Louisiana, was filed February 2, 1989 and dismissed on February 9, 1989 (Appendix F, A-49)

Motions to Dismiss were granted appellees, Celotex Corporation and Standard-Taylor Industries, et al (hereinafter designated "Standard"), on April 21, 1989 with remand to the District Court to determine appropriate amount of attorney fees, costs and expenses to be added to sanctions of $15,000 in addition to previous sanctions of $11,537.86 already paid (Appendix G, A-52).

Prior to dismissal of April 21, 1989, petitioners were ordered by Clerk of Court, U. S. Court of Appeals for the Fifth Circuit, to submit Record Excerpts as required by Local Rule 30. Record Excerpts were not due to be filed before April 24, 1989 (Appendix I, A-55).

Since judgment of dismissal was granted prior to required filing of Record Excerpts and these Record Excerpts not being filed into the record, petitioners requested a re-hearing on April 24, 1989.

Petition for re-hearing was denied on May 12, 1989,

thereby making judgment of dismissal with sanctions and penalties entered on April 21, 1989 executory (Appendix H, A-54).

JURISDICTION

(S.Ct. Rule 15; 12.3)

The following statutes and constitutional guaranties set forth the jurisdiction necessary to lodge this Writ of Certiorari:

This is an appeal from a final order subject to attorney fees, costs, penalties determinations, (Appendix H, A-54). A final appendable order is one which ends the action or proceedings before the tribuanl which makes it, leaving nothing further to be determined by that tribunal or required to be accomplished other than the administrative execution of that decision. *Powell v. United States*, 300 U.S. 276, 283, 57 S.Ct. 470, 475, 81 L.Ed. 643 (1937)

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Doctrine of Anomalous Jurisdiction

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

(a) *Fifth Amendment, United States Constitution:*

No persons shall..."be deprived of life, liberty or property without due process of law...'.

(b) *Fourth Amendment, United States Constitution:*

The right..."to be secure...against unreasonable searches and seizure".

(c) *Fourteenth Amendment, United States Constitution:*

No State shall deprive any person of life, liberty or property without due process of law..."and equal protection of the law". (Extended by analogy to Federal action protected by U.S.C. Const. Amend. 5)

STATEMENT OF THE CASE

Antitrust violations were alleged against the Celotex Corporation ("Celotex"), Standard Roofing Company of New Orleans, Inc. and Standard-Taylor Industries, Inc. (collectively referred to as "Standard"), Robbins Taylor ("Taylor") and Pierre F. Carriere ("Carriere"), and suit was filed on February 5, 1976 in United States District Court, Eastern District of Louisiana, bearing Civil Action No. 76-373-A (hereinafter designated as "76-373A", Honorable Charles Schwartz, Jr., presiding Judge.

All discovered material were designated. "Confidential," subject to Protective Orders. On August 16, 1979 (Docket #186), Judge ordered that plaintiffs file in the record a copy of any and all exhibits referred to in plain-

tiffs' statement of the case. That was impossible if confidentiality was to be preserved and protected.

On December 15, 1979, W. J. Manion, Olympia's counsel ("Mr. Manion"), placed all discovered exhibits,not subject to summons, and countervailing affidavits in 5 sealed boxes in registry of District Court (Docket Entry 200 & 207), subject to Protective Orders allowing for noticed inspection of contents of said 5 boxes in camera only.

Many of these aforsaid exhibits were discovered from Johns-Manville Sales Corporation ("J/M"), who ultimately went into bankruptcy, and automatic stay order was never petitioned.

None of the exhibits in the 5 boxes were ever entered into evidence, yet defendants used them to support their Motion for Summary Judgment.

Summary Judgment was granted defendants. Upon substitution of plaintiffs' counsel for appeal, the 5 exhibit boxes were not available for inspection or appellate brief preparation, resulting in submittal of a sub-standard brief by plaintiff-appellants, which incurred double cost, penalties and sanctions dated September 23, 1985. Subsequent thereto, Olympia sued Jack N. Price for legal malpractice.

Mr. Manion frequently requested return of all boxes and pleadings, to no avail. On June 10, 1987, Mr. Manion paid two (2) fees to retrieve records from federal warehouse storage in Ft. Worth, TX. Upon receipt of that retrieval, the 5 impounded boxes were missing. Deputy Clerk of District Court made numerous searches, without result.

When faced with a Writ of Mandamus demanding surrender of 5 boxes on October 12, 1988, those boxes were found to have been stored in U.S. Custom House, New

Orleans, Louisiana. When produced, the seals of the boxes were broken, and some documents were in disarray and misplaced.

From the foregoing facts, Mr. Manion was denied access to 5 boxes to properly prepare an appeal to rebut and resist Summary Judgment. It is unconscionable to assess sanctions and penalties when the Courts frustrated many requests to return Olympia's and Mr. Manion's property and documents that Mr. Manion was personably responsible for under the Protective Orders.

We are talking about 9 years of concealment. Under these circumstances, all judgments, orders, sanctions and penalties should be recalled and litigation re-opened to complete discovery necessary for trial. Res judicata does not attach with ill practices invalidating constitutional guaranties.

Prescription can be addressed in time only from the date the 5 boxes were returned to Mr. Manion, which occurred in October, 1988.

In summation, it is hard to believe that personnel in both offices of the Clerk of Court could be a party to such conduct; whether their defense is that they responded to direct orders from others unknown is not the direction and intention of this brief. It will suffice to state that abuse of legally protected rights and interests of Olympia and Mr. Manion have occurred which requires a judicial remedy.

REASON FOR GRANTING THE WRIT

Any request by plaintiffs for return or inspection of records allegedly retained (lost) by judiciary in violation of Fourth Amendment is based on the constitutional guarantee and right to be free from unreasonable searches and seizures. *Linn v. Chivatero,* 714 F.2d 1278 (5 Cir. 1983)

Even after the 5 boxes were produced by Clerk of District Court, District Judge demanded that these boxes be returned to him within 21 days of release (Appendix D). This demand runs counter to Local Rule 8.2 of District Court which requires removal of all exhibits within 30 days of final disposition of the case; if not removed, then the exhibits may be destroyed or otherwise disposed of by the Clerk of Court.

Fifth Circuuit has held that cause of action arising under the Fifth Amendment protection relates to action by the Federal government and not state officials or private persons. However, the problem of stigmatization addressed in 14th Amendment violation by State Action of Louisiana Judges which affects liberty interest of plaintiffs and Mr. Manion are protected by analogy under the due process guaranties of the 5th Amendment. *Rutherford v. United States,* 702 F.2d 580 (5 Cir. 1983)

The Court has inherent power to police the actions of officers of the Court and are seriously concerned with any callous disregard for constitutional rights. *Richey v. Smith,* 515 F.2d 1239, 1243 (5 Cir. 1975); *Manson v. Pulliam,* 402 F.Supp. 978, 980 (USDC, ND, Ga 1975)

Absence of records and exhibits necessary to perfect appellants' brief requires remand for trial, and any fault relative to those missing exhibits is not imputable to the plaintiff-appellants after December 15, 1979. *Versailles Arms Apts. v. Granderson,* 377 So.2d 1359 (La.App. 4 Cir. 1979); *Guillie v. Dept. of Transp. & Dev.,* 538 So.2d 1144 (La.App. 5 Cir. 1989); La. C.C.P., art. 2132, 2161

CONCLUSION

It is evident that District Judge and Appellate Judges are of one mind that their examination of 5 exhibit boxes unknown to any of the parties and with knowledge that the contents of these boxes were not in evidence, is not germane and controlling in violation of constitutional guarantees of petitioners.

It is urged that this Court will judge differently and recall all orders, sanctions, penalties, attorney fees and costs, and remand this 76-373-A litigation back to the District Court for completion of discovery and hearing based on submitted pre-trial statements as the case was postured on and before December 15, 1979.

Relying on the authorities cited herein and principles of equity, Writ of Certiorari should be granted.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing original brief of petitioners has this _____ day of _____, 1989 been mailed to interested parties and counsel of record.

_____

W. J. MANION

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
NOV 15, 1984

OLYMPIA COMPANY, INC. ET AL	Civil Action
VERSUS	No. 76-373
THE CELOTEX CORPORATION ET AL	Section "A"

J U D G M E N T

Considering the written reasons on file herein. accordingly;

IT IS ORDERED, ADJUDGED, AND DECREED, that there be judgment in favor of defendants Celotex Corporation, Standard-Taylor Industries, Inc., Standard Roofing Company of New Orleans, Inc., Robbins Taylor, and Pierre F. Carriere, and against plaintiffs Olympia Company, Inc. and Olympia Roofing Company, Inc., dismissing plaintiffs suit with prejudice, plaintiffs to bear all costs.

New Orleans, Louisiana, this 15th day of November, 1984.

/s/ Loretta G. Whyte
LORETTA G. WHYTE, CLERK

APPROVED AS TO FORM:

/s/ illegible
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
NOV 9, 1984

OLYMPIA COMPANY, INC. and OLYMPIA ROOFING COMPANY, INC. — Civil Action

VS. — No. 76-373

THE CELOTEX CORPORATION, STANDARD-TAYLOR INDUSTRIES, INC. ET AL. — Section "A"

ORDER AND REASONS

This matter came before the Court on the motion of defendant Celotex Corporation (Celotex) and the motion of defendants, Standard-Taylor Industries, Inc. and related entities and persons (Standard)[1] for summary judgment. Following oral argument, the motions were taken under submission. Having considered the memoranda, the record and the law applicable to this motion, the Court grants the motions of defendants for the following reasons.

I. Course of the Litigation

Plaintiffs, Olympia Company and Olympia Roofing Co., Inc. (hereinafter jointly referred to as Olympia) instituted this litigation in 1976, alleging, inter alia, various violations of the antitrust laws. The subsequent course of this litigation, as is evidenced by the voluminous record, involved extensive discovery, several amendments to

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[1] In Plaintiffs' Fourth Amended Complaint, (Record (R.) Vol. X, Document (D.) 218), superseding all prior pleadings of plaintiffs, the following defendants were named: (1) The Celotex Corporation, (2) Standard-Taylor Industries, Inc., (3) Standard Roofing Company of New Orleans, Inc., (4) Robbins Taylor, and (5) Pierre F. Carriere. All of the defendants, with the exception of Celotex, are hereinafter sometimes referred to jointly and collectively as "Standard."

plaintiffs' complaint, substitutions of counsel for plaintiffs, and numerous extensions of cut-off dates, continuances and the like, granted at the instance of plaintiffs. In late 1979, defendants Celotex and Standard filed motions for summary judgment, seeking dismissal of the action. However, prior to the hearing on those motions, the Court was apprised of plaintiffs' intention to again substitute counsel. The Court allowed the substitution, In order to afford plaintiffs' latest counsel an opportunity to develop the necessary facts, the Court also ordered that the pending motions for summary judgment be continued indefinitely.[2]

By an Order of the Court, plaintiffs then filed their Fourth Amended Complaint, which superseded all prior pleadings of plaintiffs.[3] As the result of a status conference held on May 14, 1980, the Court entered an Order, setting forth the manner in which this case was to further proceed, and requiring plaintiffs to file a Pretrial Statement which would thoroughly set forth plaintiffs' case and the factual and evidentiary basis for same.[4] Specifically, plaintiffs were directed to articulate their claims, by setting forth "in simple, declarative sentences all material facts relied upon by Plaintiffs in support of their claims for relief. . . " The Court directed that the "Pretrial Statements shall serve as each parties' contribution to the Pretrial Order, " and specified that "[a]ny factual contention, legal contention, any claim for relief or defense in whole or in part, or affirmative matter not set forth in detail as provided hereinabove shall be deemed abandoned, uncon-

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[2] In a Minute Entry of January 4, 1980, the Court noted that it was "of the opinion that [plaintiffs' counsel's] entrance in the case [would] result in a narrowing and clarifying of the issues and [would] in all probability obviate the necessity of hearing all of the contentions set forth in the motions for summary judgment." R. Vol. X, D. 211.

[3] R. Vol. S, D. 212, 218, 219 and 220.

[4] R. Vol. X, D. 221.

troverted, or withdrawn, notwithstanding the contentions of any pleadings or other papers previously filed herein. The case shall be tried upon the Pretrial Statements." Finally, the Court provided that ::[i]n the event defendants choose to do so, they may admit Plaintiffs' narrative facts relating to a legal contention or contentions for purpose of a Motion for Summary Judgment or Partial Summary Judgment. Any such Motion will be heard in accordance with the Federal Rules of Civil Procedure and the Local Rules of this Court, except that the narrative statements of fact in the parties' Pretrial Statements shall serve as the Statements of Material Facts required by Local Rule 3.9."[5] Furthermore, plaintiffs were allowed to take additional discovery subject only to the restriction that such discovery not be duplicative. Plaintiffs' Pretrial Statement, although it was filed approximately six months after the deadline set by the Court for its filing, was accepted by the Court.[6] Thereafter, the voluntary dismissal of certain of plaintiffs' claims and the motions of defendants to strike necessitated amendments to the plaintiffs' Pretrial Statement.[7] In its final form, Plaintiffs' factual contentions are set forth in their Second Amended Pretrial Statement. In response to the motions of defendants for summary judgment, plaintiffs filed into the record a letter of counsel, stating that "the pretrial statement contains both

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[5] R. Vol. X D. 221, Order of May 14, 1980, ¶¶ 25, 26, 37-39.

[6] Defendants filed motions to dismiss in May of 1982 based upon the failure of plaintiffs to comply with the Court's Order in this regard. On August 10, 1982, one day prior to the scheduled hearing date on those motions, plaintiffs filed the Pretrial Statement.

[7] R. Vol. XII-XIII, D. 282-298.

the facts and law on which Plaintiffs must rely." the motions were fixed for hearing on a date approximately two weeks prior to the pretrial conference and two days prior to the expiration of the discovery deadline set by the Court.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary judgment as a matter of law." Rule 56(c), Fed. Rules Civ. Proc. When a motion for summary judgment is made and supported in the manner provided in Rule 56(e) of the Federal Rules of Civil Procedure, "an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e), Fed. Rules Civ. Proc.

The Court is not unmindful of the Fifth Circuit's admonition to approach summary judgment with caution, particularly with respect to anti-trust litigation. *Transource International, Inc. v. Trinity Industries, Inc.*, 725 F.2d 274, 279 (5th Cir. 1984). Nonetheless, summary judgment is sometimes appropriate in anti-trust actions. "It is now established that 'simply because a suit is brought under the antitrust laws does not foreclose a summary judgment.'" *Transource International, Inc. v. Trinity Industries, Inc.*, 725 F.2d 275, 279, quoting *In re Municipal Bond Reporting Antitrust Litigation*, 672 F.2d 436, 440 (5th Cir. 1982), citing *Aladdin Oil Co. v. Texaco, Inc.*, 603 F.2d 1107, 1112 (5th Cir. 1979).

Despite the long and arduous course of this litigation, despite every reasonable opportunity afforded the plaintiffs to discover triable issues of fact, and despite the

Court's many efforts to ensure that plaintiffs' alleged grievances, if proved, would be redressed, the Court finds that defendants are entitled to summary judgment, based upon the uncontroverted evidence and the law applicable to this case.

II. Motion of Celotex for Summary Judgment

A. The Facts

For the purpose of this motion, Celotex has admitted all of the narrative statements of fact in plaintiffs' Second Amended Pretrial Statement, except for those which Olympia admits have no factual basis or support and which have been conclusively refuted with sworn testimony based upon personal knowledge. The narrative statements of fact are incorporated herein by reference and are attached hereto as Appendix I. Additionally, Celotex has submitted other facts which are uncontested and which may be material. These are contained in Celotex's Rule 3.9 Statement are supported by the evidence and have not been rebutted or controverted by plaintiffs in the manner provided under rule 56(e). Thus, the Court accepts these facts as undisputed.

Based upon plaintiffs' narrative statement of facts and the record herein, Olympia's contentions may be summarized as follows. Olympia competed with Standard and other similar companies in securing roofing jobs and furnishing roofing services within the New Orleans area. In doing so, Olympia purchased roofing materials from Celotex or its business predecessors. For several years, Olympia was on Celotex's Approved Roofers list. This, based upon the uncontroverted evidence, enabled Olympia to secure a Celotex roofing bond covering any roof that (1) was installed and repaired by an approved roofer (2) using Celotex materials (3) in accordance with Celotex's publish

ed specifications. Roofing bonds are significant in the context of this case for two reasons. First, Olympia was a union roofing contractor.[8] Architectural specifications control whether a roofing job must be performaed with union labor and whether a roofing bond will be required. According to Olympia, these specifications provide that virtually all large commercial roofing jobs ($250,000 and over) must be bonded and applied by union roofers. Accordingly, Olympia contends that the ability to secure a bond was indispensible to a union roofing contractor in securing such jobs. Second, when Celotex's competitors reduced their bond coverage for unspecified reasons, Celotex "became possessed of a unique bond program," and was, thus, able to achieve a significant share of the market for "sale of roofing materials to bonded union roofing contractors" in the Greater New Orleans Area "because of its unique bonding program."[9]

According to Olympia, Celotex thereby obtained a "dominant and monopolistic position" in the relevant market, and enjoys a market share in excess of 60%.[10] Plaintiffs also assert that in several instances, Standard was granted lower prices on certain materials by Celotex than those granted to Olympia. The factual allegations are the basis for the alleged violations specified by plaintiffs in the Pretrial Statement, as follows: (1) monopolization and attempted monopolization of the relevant markets, (2) unreasonable restraint of trade within the relevant markets in violation of Section 1 of the Sherman Act, (3) price discrimination in violation of Section 2(a) and (f) of the Robinson-Patman Act, and (4) tying in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act.[11]

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[8] Although this is not specified, it is implicit in plaintiffs' contentions.

[9] Olympia's Second Amended Pretrial Statement, ¶¶ 18-26, 36.

[10] *Id.*

[11] Olympia's Second Amended Pretrial Statement, Legal Contentions, P. 32.

(On the latter allegation, Olympia contends that Celotex tied the furnishing of roofing bonds to the sale of materials.) The allegations of plaintiffs' Pretrial Statement contain the implications that Celotex and Standard conspired, but there is no specific allegation to that effect. A strict application of the Court's order relative to the Pretrial Statement would require that this legal contention be deemed abandoned or withdrawn. Nonetheless, the Court has addressed the issue of conspiracy herein.

Celotex contends that all of Olympia's allegations are either irrelevant, insufficient, unsupported, or contradicted by unrefuted evidence. Celotex further contends that certain of Olympia's claims are time-barred.

B. Fact of Damage and Amount of Injury

Plaintiffs seek treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15, based upon alleged antitrust violations under several theories. In order to recover such damages, a plaintiff must prove (1) a violation of the antitrust laws, (2) cognizable injury attributable to that violation, and (3) at least the approximate amount of damage. *Chrysler Credit Corp. v. J. Truett Payne Co., Inc.*, 670 F.2d 575, 579 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982). Mere proof of an antitrust violation, in and of itself, is not sufficient to support an award for damages; rather, a plaintiff must prove, as a matter of fact and with a fair degree of certainty, injury attributable to something the antitrust laws were designed to prevent. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562-563 (1981). "It is imperative that the fact of the damage causing injury be established." *In Re Municipal Bond Reporting Antitrust Litigation*, 672 F.2d 436, 443 (5th Cir. 1982).

Olympia's conclusory allegations do not demon-

strate that it has suffered actual injury. The only element of damage that Olympia has attempted and quantify is that allegedly attributable to price discrimination.[12] However, that calculation merely presumes damages from the differential between prices extended to Olympia and Standard. As is developed further in our discussion of plaintiff's price discrimination claims, it does not purport to show actual injury by demonstrating the likelihood that Olympia lost sales or profits because Celotex extended discriminatory prices to standard, as required by law for Olympia to prevail on its claims.[13] Summarily, none of Olympia's allegations support the conclusion, or even attempt to demonstrate, that it suffered actual injury. The Court's review of the entire record in this matter leads to the inevitable conclusion that plaintiffs' claim of injury and for damages resulting therefrom amounts to nothing more than unsupported assumptions, conclusory allegations, and undocumented hypotheses, which are insufficient to withstand a summary judgment motion. In this case, as in the case of *In Re Municipal Bond Reporting Antitrust Litigation*, 672 F.2d 436, 443 (5th Cir. 1982), plaintiffs have not established a triable issue of *fact* of injury, or of its cause, must less the amount of damage. There is a dearth of evidence which would establish this fact. Yet, at the trial of this matter, the plaintiffs would have been required to put forth substantial evidence on this issue. *Chrysler Credit Corp. v. J. Truett Payne Co., Inc.*, 670 F.2d 575,582 (5th Cir. 1982), **cert. denied**, 459 U.S. 908 (1982). Olympia relies on the statement that it "propose[s] to offer proof of damages. . . employing a ten year straightline projection of sales and loss net profits for a 'future' period of ten years

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[12] Olympia's Second Amended Pretrial Statement. ¶55.

[13] *See*, e.g., *Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562-563 (1981); *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 580 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982).

from and after 1976."[14] However, this proposed methodology is of no moment, absent sufficient allegations of, and evidence to support, the fact of injury, which are nowhere to be found in the record of this case. Since Olympia has apparently chosen to rest upon its pleadings rather than substantiating its claims with evidence, summary judgment is appropriate. Rule 56(e) Fed. Rules Civ. Proc.; *See*, e.g., *In Re Municipal Bond Reporting Antitrust Litigation, supra; Jones v. Borden Co.*, 430 F.2d 568, 574 (5th Cir. 1970).

Having found that plaintiffs' claim for damages is fatally deficient in that plaintiffs have failed to produce evidence of injury and the amount of damages, the Court has in effect found that summary judgment on Olympia's claims is warranted herein. Nonetheless, for the sake of completeness, the Court further finds that summary judgment is warranted as to each of Olympia's allegations of violations of the antitrust laws, as set forth herein.

C. Monopolization

Olympia has failed to adduce evidence upon which a trier of fact could conclude that a *prima facie* case of monopolization has been established. the gravamen of Olympia's claim is its contention that from and after the year 1974, Celotex's unique bonding program eventually allowed it to achieve a market share in excess of 60%.[15] Olympia's allegations in connection with this claim are either unsupported by the facts or directly contradicted by the evidence, thus, requiring that summary judgment be granted.

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[14] Olympia's Second Amended Pretrial Statement, ¶55.

[15] Olympia's Second Amended Pretrial Statement, ¶36.

Olympia alleges that the relevant product market consists primarily of union bonded commercial roofing jobs over $250,000.00 in value.[16] Yet, it is uncontested that the largest job Olympia performed during the period from 1972 to date was in the range of $60,000.00 to $100,000.00. Olympia's president testified to this fact.[17] Thus, Olympia has defined the relevant product market, for purposes of this litigation, as one in which it was not even a participant for two years prior to and during the period of time when Celotex allegedly began to acquire monopoly power. Moreover, Olympia's definition of this market reflects an effect on a specific competitor, rather than the realities of competition, ignoring a major premise of antitrust litigation, that is, that the antitrust laws are concerned with "the protection of competition, not competitors." *See, Brown Shoe Co. v. United States,* 370 U.S. 294, 320 (1962).[18] Olympia's allegations of monopolization, in conformance with the evidence, cannot proceed past the threshold determination of the product market allegedly monopolized. As such, its contentions can only be con-

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[16] Olympia's Second Amended pretrial Statement, ¶¶56(g), 58(d)

[17] Deposition of William J. Manion, taken on May 31 and June 2, 1977, Vol. III, Tr. 114-115.

[18] The fallacy of plaintiff's reasoning is shown by Justice Stevens' comments in *Mullis v. ARCO Petroleum Corp.*, 502 F.2d 290, 298-299, (7th Cir. 1974):

> "The fact that an injury to a particular competitor may be unusually severe is not a justification for adopting a market definition which only considers the particular product line which he has previously sold or purchased. . .And whether the competition is more intense on the seller's or the buyer's side of the market, we may not arbitrarily segregate one brand from equally acceptable substitutes in order to protect a particular competitor from injury."

strued as going to an effect on a competitor,[19] rather than to competition in a defined product market.

Furthermore, the relevant geographic market alleged by Olympia has been artificially delineated without a full consideration of the facts and evidence. Olympia's own experts conceded that the existing information did not indicate whether the market chosen took into account either the areas in which Olympia actually competed[20] or the areas in which Olympia's actual competitors competed.[21] This reinforces the conclusion that the nature of the alleged wrong to Olympia must be couched in terms of an effect on a specific competitor, rather than on competition. And, as previously stated, it is the latter of these which the antitrust laws seek to protect.

Moreover, Olympia's allegation that Celotex acquired a market share in excess of 60% can only be termed sheer speculation, unsupported by any evidence which could possibly create a triable issue of fact in this regard. The lack of any evidence which would allow a trier of fact to determine Celotex's market share is predicated primarily upon the failure of Olympia to define the relevant product and geographic markets on the basis of any evidence of record. There is simply no data of record from which even a rough approximation of market shares could be derived, and the Court is left with no evidence of the origin

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[19] From the standpoint of adverse effects, the competitor in question is Olympia; from the standpoint of desirable effects, the competitor in question is Standard, based upon plaintiffs' allegations.

[20] Deposition of Dr. Jane S. Cromartie, taken on January 5, 1984, Tr. 140-148; Deposition of Phillip W. Jeffress, taken on January 4, 1984, Tr. 79-93, 140-141 & Exhibits 3, 4.

[21] Indeed, the geographic market utilized by plaintiffs' experts did not include Baton Rouge, Louisiana, although it was a controversy surrounding a Baton Rouge project which precipitated this litigation. See, Jeffress deposition, Tr. 54-63; Complaint (R. Vol. I, D. 1).

or accuracy of this figure. Olympia's experts admitted that the data accompanying its Second Amended Pretrail Statement showed only the percentage of Celotex sales that went to certain selected roofers in the New Orleans area, and agreed that this information had little (if any) meaning, in the context of this case, absent comparable figures for Celotex competitors. These same experts testified that the information was incomplete even as to Celotex sales and conceded that even complete information as to such sales would not enable them to adequately define Celotex's share of the relevant market.[22]

It is well-settled that the relevant product and geographic markets must be defined with some degree of precision to enable the trier of fact to determine the existence of monopoly power. *Dimmit Agri Industries, Inc. v. CPC International Inc.*, 679 F.2d 516 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983). "[A] section 2 plaintiff attempting to prove either completed monopolization or attempt must provide the jury with sufficient evidence to permit it to define the relevant geographic and product market." *Id.* at 525. *See also, Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); *Municipal Bond Reporting Antitrust Litigation*, 672 F.2d 436, 441 (5th Cir. 1982); *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 276, 284-286 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979). Absent evidence to create a triable issue of fact in this regard, summary judgment is appropriate. Scranton Construction Co. v. Litton Industries Leasing Corp., 494 F.2d 778, 783 (5th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

Furthemore, in this Circuit, "[i]t appears that something more than 50% of the market is a prerequisite

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[22] Cromartie Deposition, Tr. 33-35, 62-69, 77-80, 148-149, 207, 266-272, Exhibits 5 & 6; Jeffress Deposition, Tr. 79-83, 140-141, Exhibits 3 & 4.

to a finding of monopoly." *Cliff Food Stores, Inc. v. Kroger Co.*, 417 F.2d 203, 207 n. 2 (5th Cir. 1969). *Se also, Dimmit Agri Industries, Inc. v. CPC International, Inc.*, 679 F.2d 516, 528-531, nn. 11-13 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983). The Fifth Circuit subscribes to the view that evidence of defendant's conduct in the market is inadequate to sustain a finding of monopoly, absent accurate information demonstrating a requisite market share. *Dimmit Agri Industries, Inc. v. CPC International, Inc.*, 679 F.2d 516, 528-531 and nn. 11-14 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082)1983); *see also, P. Agreeda & D. Turner, II Antitrust Law* ¶515 (1978).

In the instant case, the record discloses little more than unsupported and conclusory allegations of Celotex's conduct. And, viewing all inferences from the evidence of record in favor of the non-moving party, there is no evidence from which a trier of fact could conclude that Celotex enjoyed the requisite market share. Olympic argues that "industry observers" have concluded that Celotex acquired such a market share. Again, this is a conclusory allegation which is not borne out by the facts of this case, as shown by the record. Olympia's experts concede that there is insufficient data to come to a conclusion, with any degree of precision or accuracy, as to Celotex's share of the market. [23] Nor has Olympia demonstrated for purposes of defeating summary judgment, anywhere of record including in its Pretrial Statement, that there is evidence to support a finding, based on other than speculation, relative to Celotex's market share. Although in certain instances, an examination of the evidence on the issue

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[23] Jeffress deposition, Tr. 63-75; Cromartie deposition, Tr. 207. We note that one of these experts testified that he reached a conclusion of market power, based upon Celotex's bonding program which set it apart from other competitors. Jeffress deposition, Tr. 74-75. However, as is discussed, infra, Celotex's the bonding program does not constitute a willful acquisition of monopoly power, as required for a finding of monopolization.

of market share would reveal deficiencies which go to the weight and sufficiency of the evidence, in the instant case, there is simply no basis for a trier of fact to determine what is the relevant product and geographic markets and what is the defendant's market share. Under these circumstances, it would be futile for plaintiffs to proceed to trial on these claims.

Moreover, Olympia's allegation of the manner in which Celotex acquired monopoly power warrants the conclusion that defendants are entitled to judgment in their favor as a matter of law. Olympia alleges that Celotex "became possessed of an unique bond program", which allowed it to achieve a share of the market for sale of roofing materials to bonded union roofing contractors in excess of 60%. [24] Olympia asserts that this achievement resulted from charges in the bond programs of Celotex's competitors, and the circumstances attendant therein. [25] Thus, based solely upon Olympia's allegations in this regard, it is clear that if, in fact, Celotex achieved a market share of greater than 60% by reason of the bond program, then that achievement was the result of the unilateral actions of its competitors, Indeed, Olympia's experts stated unequivocally that Celotex's monopoly power, if any, was attributable to its bond becoming unique through the actions of its competitors with regard to their respective bond programs, as opposed to a willful acquisition of monopoly power by Celotex. [26] The United States Supreme Court has made it clear that a claim of monopoly will not lie absent willful acquisition of power:

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[24] Olympia's Second Amended Pretrial Statement, ¶36.

[25] *Id.*

[26] *Cromartie deposition, Tr. 38-39, 51-55, 174-178; Jeffress deposition, Tr. 74-75, 94, 113-117, 125-126, 132-134, 189-190. (R Vo.*

> "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

United States v. Grinnell Corp., 384 U.S. 563, 570-571 (1966). Olympia's allegations, insofar as they might be construed to assert the acquisition of monopoly power through other means are addressed in the discussion below of the remaining claims.

D. Attempted Monopolization

In order to prove attempted monopolization under § 2 of the Sherman Act, 15 U.S.C. §2, Olympia must demonstrate that (1) Celotex had the specific intent to accomplish the illegal result, and (2) there was a "dangerous probability" that the attempt would be successful. *Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 276 (5th Cir. 1978), cert. denied,* 440 U.S. 939 (1979).

Celotex argues that summary judgment should be granted on this claim based upon Olympia's failure to produce any evidence of specific intent. Following our review of all of the evidence of record, taking the factual allegations of Olympia's Pretrial Statement as true, and viewing all inferences from the evidence in favor of the non-moving party, we are enclined to agree. Olympia's claim of attempted monopolization, again, rests primarily on Celotex's acquisition of a unique bond program, which arose solely from the unilateral actions of Celotex's competitors. Based upon the facts, there is a dearth of evidence from which a trier of fact could conclude that Celotex had specific intent to acquire a monopoly. We are not unmindful that summary judgment is rarely appropriate on the issue of a par-

ty's intent. However, in the instant case, there is a more compelling basis upon which summary judgment must be granted as to this claim. The Fifth Circuit has held that proof of the relevant market in attempt cases is required in connection with the dangerous probability of success element of the attempt offense. *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 286 (5th Cir. 1978, *cert. denied*, 440 U.S. 939 (1979). Specifically, it is necessary for the plaintiff to establish a dangerous probility of monopolization *in the relevant markets. Id.* Thus, Olympia cannot prevail on this claim, based upon its failure to sufficiently define and establish the relevant markets, as discussed in sub-part C, above. In this case, evidence is "entirely lacking of the relevant market, its conditions, or of a monopoly or a dangerous probability of one"; thus, summary judgment is appropriate. *Scranton Construction Co. v. Litton Industries Leasing Corp.*, 494 F.2d 778, 783 (5th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

E. Price Discrimination

Celotex contends that Olympia's claims of price discrimination are time-barred. A four-year statute of limitations is provided in §4b of the Clayton Act, 15 U.S.C. §15b. It is uncontested that Olympia chose to discontinue dealing with Celotex in October of 1973.[27] The original complaint in this matter was filed on February 5, 1976.[28] Price discrimination was not specifically alleged by plaintiffs until the filing of an amended complaint on August 31, 1977.[29] Rule 15(c) of the Federal Rules of Civil Procedure provides, in pertinent part, as follows:

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[27] Deposition of William J. Manion, taken on June 2, 1977. Tr. 126.

[28] R. Vol. 1 D. 1.

[29] R. Vol. III D. 63.

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

Pleadings must be construed "as to do substantial justice." Rule 8(f) Fed. Rules Civ. Proc. In an antitrust action, pleadings must be given a liberal reading. *Exhibitors Poster Exchange, Inc. v. National Screen Service Corp.*, 421 F.2d 1313 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971). Although Olympia's original complaint did not specifically set forth an allegation of price discrimination, it is as that alleged in the original complaint. Thus, the claim is not time-barred.

Nonetheless, Olympia's claim of price discrimination cannot withstand summary judgment for several reasons. Olympia seeks damages for price discrimination allegedly (1) in violation of § 2 of the Robinson-Patman Act and (2) as part of a conspiracy in violation of § 1 of the Sherman Act. Even assuming that the underlying factual contentions upon which Olympia bases this claim are true, the claim is untenable.

(1) *Robinson-Patman Act*

Under § 2 of the Robinson-Patman Act, 15 U.S.C. §13, Olympia, in order to prevail, would be required to prove that Celotex discriminated in price (1) between different purchases (2) of commodities of like grade and quality (3) where the effect of such discrimination is to substantially lessen competition or tend to create a monopoly, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, and (4) where such differential is not in response to changing market conditions. *M.C. Manufacturing Co., Inc. v. Texas Foundries, Inc.*, 517 F.2d 1059,

1065 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976). Thus, a finding that the Act has been violated requires a showing that purchases are in competition with one another at the time of the purchases, and that there was a sale of like goods to at least two different purchases at different prices with an adverse effect upon competition. *Id.*

The uncontested evidence indicates that Olympia neither purchased materials from, nor placed orders with, Celotex after October of 1973.[30] Yet, Olympia claims damages for price discrimination from 1972 to 1976.[31] It is abundantly clear that Olympia cannot recover on any claim for damages allegedly resulting from price discrimination occurring after October of 1973, based upon the specific elements of the statute. Furthermore, Olympia has summarized forty-nine alleged instances of price discrimination in its Pretrial Statement, asserting that these "relate to contract work with respect to which Olympia and Standard were in direct competition."[32] This allegation is directly contradicted by the only relevant evidence on the issue. Specifically, of these forty-nine instances, only six represented situations in which Olympia and Standard made roughly contemporaneous purchases of similar goods from Celotex at different prices.[33] And, in those six instances, it is undisputed that Standard purchased materials from Celotex only after it had been awarded a roofing job. Based upon these facts, and upon the definition of a violation under the Robinson-Patman Act, no such violation is implicated. As previously stated, the Act protects purchases in competition with one another at the time

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[30] III Manion deposition (1977) Tr. 112-114, 127-129, II Manion deposition (1977), Tr. 23-24.

[31] Olympia's Second Amended Pretrial Statement, ¶ 55.

[32] Olympia's Second Amended Pretrial Statement, § 32.

[33] deposition of William J. Manion, taken on August 24, 1978. Tr. 186.

of the purchases; it is irrelevant that the companies may have entered into competitive bidding, or that the successful bidder was ultimately able to obtain prices below those offered to its competitiors in the bidding process. *M. C. Mannufacturing Co., Inc. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1066-1068 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976).

Additionally, even if Olympia had succeeded in showing that these six instances of "discrimination" constituted contemporaneous purchases of similar goods at different prices, the claim still could not rise to the level of a violation of the Robinson-Patman Act. A simple mathematical calculation reveals that Olympia paid between $150 and $235 more than Standard did for the same materials. Olympia's expert agreed that price differential in the amount of $1,000.00 was"definitely" de minimus.[34] As previously stated, the Robinson-Patman Act is only violated where the effect of price discrimination may be to substantially lessen competition. It is inconceivable that the deminimus price differential at issue could be said to have such a substantial, if any, effect on competition. It is inconceivable that the de minimus price differential at issue could be said to have such a substantial, if any, effect on competition. *See*, e.g., *Hanson v. Pittsburgh Plate Glass Industries, Inc.*, 482 F.2d 220, 224 n.8 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974).

It should be noted at this juncture that Olympia has apparently sought to reserve the right to present additional instances of price discrimination.[35] Nonetheless, the time to have presented such further evidence would have been in opposition to the motions herein, particularly since

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34 Cromartie deposition, Tr. 264.

35 Olympia's Second Amended Pretrail Statement, ¶ 32.

Olympia has had over seven years in which to discover relevant evidence on the issue and to compile this information.

As defendant points out, at a trial of this matter, based upon the undisputed facts, Olympia would fail to make out a prima facie case on the issue of price discrimination. Moreover, and more importantly for purposes of summary judgment herein, Celotex has established by uncontroverted evidence that any discriminatory price was extended in good faith to meet a lower competitive offer. Section 2(b) of the Robinson-Patman Act 15 U.S.C. §13(b), has been interpreted to afford an absolute defense to a charge of violating § 2(a) of the Act, 15 U.S.C. § 13(a) where the defendant shows that lower prices were extended in good faith to meet an equally low price of a competitor. *FTC v. Sun Oil Co.*, 371 U.S. 505, 513-514 (1963). The Affidavits of Sam E. Brasher and W.W. LeGrow demonstrate that Celotex lowered its prices to individual roofers only when necessary to do so in order to meet a lower competitive offer, and only after a formal, detailed multi-tier system of verification.[36] The verification methods employed by delotex exceeded even those suggested by Olympia's expert.[37] And, these methods fall well within the appropriate ones discussed by the Supreme Court in *United States v. United States Gypsum Co.*, 438 U.S. 422, 454-455 (1978).[38] Indeed, this defense has been sustained based

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[36] Affidavit of Sam E. Brasher ¶¶ 7-20; Affidavit of W.W. LeGrow ¶¶ 20-30.

[37] Cromartie deposition, Tr. 245-252.

[38] On the issue of the good faith, meeting-competion defense, the Supreme Court stated:

> "Given the fact-specific nature of the inquiry, it is difficult to predict all the factors the FTC or a court would consider in appraising a seller's good faith in matching a competing offer in these circumstances. Certainly, evidence that a seller had received reports of similar discounts from other customers...or was threatened with a termination of pur-

upon less comprehensive schemes than that employed by Celotex for verification. *See*, e.g., *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69 (1979); *Jones v. Borden Co.*, 430 F.2d 568 (5th Cir. 1970); *Callaway Mills Co. v. FTC*, 362 F.2d 435 (5th Cir. 1966). The Supreme Court recently set forth the elements of this defense, as follows:

> "In summary, the meeting-competition defense requires the seller at least to show the existence of facts that would lead a reasonable and prudent person to believe that the seller's lower price would meet the equally low price of a competitor; it also requires the seller to demonstrate that its lower price was a good faith response to a competitor's lower price." *Falls City Industries, Inc. v. Vanco Beverage*, Inc., 460 U.S. 428, 103 S.Ct. 1282, 1297 (1983).

Celotex has established this defense based upon uncontroverted evidence. Olympia has asserted no substantiated facts to put the meeting-competition defense at issue, as it must do in order to defeat summary judgment on its price discrimination claim. Olympia's president conceded that he has no information concerning (1) what Celotex products Olympia bought or attempted to buy at which prices and at what times, (2) whether Celotex was actually meeting competitive offers when it extended price discounts to other roofers, and (3) whether Celotex attempted to verify competitive prices.[39] Nor has Olympia

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(Footnote 38 continued)

chases if the discount were not met...would be relevant in this regard. Efforts to corroborate the reported discount by seeking documentary evidence or by appraising its reasonableness in terms of available market data would also be probative as would the seller's past experience with the particular buyer in question." 438 U.S. at 454-455. [citations omitted.]

[39] Manion deposition (1978), Tr. 55-62, 69-72, 86-88, 91-93, 108-111, 115-116, 133, 136.

provided the Court with any evidence to create an issue of fact on its price discrimination claims. Under circumstances such as these, summary judgment is appropriate. *Jones v. Borden Co.*, 430 F.2d 568, 572 (5th Cir. 1970).

We note that this claim is also subject to summary judgment for the reason to which we previously alluded, i.e., failure to show any actual injury and damage. Olympia has calculated its alleged damage from price discrimination on the basis of an average differential of 5% between the cost it and Standard paid for Celotex materials. Olympia has then projected the effect upon its business, both in terms of profits and increased business, based upon the hypothetical premise of Olympia being granted an average 5% price reduction.[40] This approach is not a proper method for proving injury and damage under the Robinson-Patman Act. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562-563 (1981); *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 577 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982). Assuming a violation of the Act has been shown, damages must be proven rather than presumed on the basis of the price differentials, since proof of actual injury is a prerequisite to recovery. *Id.* As previously stated, Olympia has come forth with nothing but its conclusory allegations of injury and damage, based upon improper assumptions. Furthemore, Olympia's calculation of alleged damages is premised upon the assumption that the allegedly unlawful price discrimination will be extended to Olympia, as well as to Standard. This assumption is unacceptable in actions such as the present one. *M.C. Manufacturing Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1063-1065 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976).

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[40] Olympia's Second Amended Pretrial Statement, ¶55.

(2) *Sherman Act*

Under Section 1 of the Sherman Act, 15 U.S.C. §1, "[e]very contract, combination ...or conspiracy in restraint of trade or commerce...is ... illegal." The conspiracy issue will be specifically dealt with in a separate discussion. However, suffice it to say that this claim suffers from many of the same deficiencies addressed above. Primarily, the claim is deficient for plaintiffs' failure to produce evidence to create a triable issue of fact as to actual injury and damage. *See,* e.g., *M.C. Manufacturing Co., Inc. v. Texas Foundries, Inc.,* 517 F.2d 1059 (5th Cir. 1975), *cert. denied* 424 U.S. 968 (1976). Under the *Texas Foundries* rationale, Olympia would have to show not merely that Celotex conspired to drive Olympia out of business by extending discriminatory prices to its competitors, but also that (1) its competitors were warded jobs, (2) the competitors received unjustified discounts, and (3) Olympia was the next lowest bidder. There are not even the barest of factual allegations, or inferences therefrom, in Olympia's Pretrial Statement to support such a conclusion.

F. Tying

Olympia alleges that buyers were "coerced" into buying Celotex's building materials in order to obtain the more desirable bonds, and thus, Celotex tried roofing materials to roofing bonds in violation of § 3 of the Clayton Act, 15 U.S.C. §14.[41] The Fifth Circuit has identified four characteristics of an illegal tying arrangement, as follows: (1) two separate products, the tying product and the tied product, (2) sufficient economic power in the tying market to coerce purchase of the tied product, (3) involvement of a not insubstantial amount of interstate commerce in the tied market, and (4) anticompetitive effects in the tied market. *Driskill v. Dallas Cowboys Football Club, Inc.,*

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[40] Olympia's Second Amended Pretrial Statement, ¶53.

498 F.2d 321, 323 (5th Cir. 1974). More recently the Supreme Court has discussed the elements of a tying arrangement and particularly, the necessity that there be two separate products, in the case of *Jefferson Parish Hospital District No. 2 v. Hyde*, ___ U.S. ___, 104 S.Ct. 1551 (1984). The considerations on such a claim are whether two separate products were being sold that may be tied together, and, if so, whether the sellers used their market power to force their purchases to accept the tying arrangement. *Id.* at 1561. Whether two district products are involved "turns not on the functional relation between them, but rather on the character of the demand for the two items." *Id.* at 1562. A tying arrangement cannot exist unless two separate product markets have been linked. *Id.* at 1563, We find that the principals ennunciated in *Hyde* are dispositive of the instant case. Olympia has not alleged, nor can it conceivably claim, that Celotex's materials and its bonds are two separate and distinct products derived respectively from two separate and distinct product markets. There is simply no market for roofing bonds in and of themselves, absent bonded materials. Furthemore, and as previously discussed, Olympia has not even defined the relevant markets sufficiently to state such a cause of action. Summary judgment on the tying claim is appropriate.

G. Conspiracy

Olympia's factual allegations do not state a viable claim of conspiraty, and the record is completely devoid of any evidence to support this claim. Olympia apparently relies on its contention that Celotex "secretly" communicated to Standard that Olympia would not be accorded approved status at the same time Celotex published and circulated its current Approved Roofer list, from which Olympia had been excluded. [42] Celotex had produced

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[42] Olympia's Second Amended Pretrial Statement, ¶¶47, 49.

sworn affidavits denying the existence of any conspiracy between it and Standard. [43] Olympia has produced nothing in response thereto to create a triable issue of fact on the claim. The Fifth Circuit has consistently held that summary judgment is appropriate where a plaintiff rests on its mere allegations and fails to produce substantial evidence showing the existence of a genuine issue of fact, as required by Rule 56(e) of the Federal Rules of Civil Procedure. *See* e.g., *Parsons v. Ford Motor Co., cert. denied,* 459 U.S. 832. 669 F.2d 308, 313 (5th Cir. 1982); *Southern Concrete Co. v. United States Steel Corp.,* 535 F.2d 313, 318 (5th Cir. 1976); *Solomon v. Houston Corrugated Box Co.,* 526 F.2d 389, 395-397 (5th Cir. 1976); *Scranton Construction Co. v. Litton Industries Leasing Corp.,* 494 F.2d 778, 782 (5th Cir. 1974), *cert. denied,* 419 U.S. 1105 (1975). Considering the several years of the pendency of this litigation, "[t]he mere hope that evidence may turn up to support a conspiracy does not suffice to warrant a trial." *Bougeois v. A.B. Dick Co.,* 386 F.Supp. 1094, 1097 (W.D. La. 1974).

III. Motion of Standard for Summary Judgment

For the reasons set forth relative to Olympia's motion for summary judgment, Standard's motion should, likewise, be granted. We shall not belabor and reiterate these reasons. However, we note certain additional points warranting summary judgment in favor of Standard.

A. Monopolization and Attempted Monopolization

Subparts II B, C and D are incorporated herein by reference. Additionally, the affidavit of Pierre F. Carriere further supports the conclusion that the relevant markets have not been accurately or sufficiently defined by Olym

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[43] Brassher Affidavit ¶¶ 7, 34; LeGrow Affidavit ¶¶ 16-19.

pia. Olympia's reliance upon gross sales solely to New Orleans roofers necessarily assumes that the market for roofing jobs in New Orleans is restricted to roofing contractors actually located in New Orleans, and further assumes that those contractors who are located in New Orleans do not perform jobs outside the New Orleans area. Both of these assumptions are unsupported by the facts and evidence, and are specifically refuted by the affidavit of Mr. Carriere. That affidavit indicates that although Standard is and always has been located in New Orleans, it has done extensive business throughout the State of Louisiana, and in the adjoining States of Mississippi and Texas, as well as in Georgia. Accordingly, the figures which Olympia has compiled as to Standard's purchases from Celotex and Johns-Manville include purchases by Standard not only for work which Standard performed in the New Orleans area, but also for work which Standard performed throughout Louisiana and in other states. As is further indicated and unrefuted by Carriere's affidavit, non-local roofing contractors constitute a significant segment of competitors in the New Orleans area. Yet, this fact has been ignored by Olympia in delineating the relevant geographic markets and in its allegations of market share.

B. Price Discrimination

Subpart II E is incorporated herein by reference. Furthermore, Standard has established, based upon unrefuted evidence, that it legitimately shopped for the best available price on roofing materials, and that it never received a price known or believed to be improper or discriminatory against a competitor. [44] In order to defeat summary judgment, Olympia would have had to come forward with evidence to create an issue of fact in this regard. This, Olympia has not done.

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[44] Affidavit of Pierre F. Carriere.

Accordingly, and for the foregoing reasons, it is ordered that the motions of defendants for summary judgment, dismissing plaintiffs' claims, be and they are hereby GRANTED. The clerk of court is directed to enter judgment in Accordance herewith.

New Orleans, Louisiana, this 9th day of Novermber, 1984.

/s/ Illegible

UNITED STATES DISTRICT JUDGE

APPENDIX B

OLYMPIA COMPANY, INC. AND
Olympia Roofing Company, Inc.,
Plaintiffs-Appellants,

v.

The CELOTEX CORPORATION, et al.,
Defendants-Appellees.

No. 84-3850
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Sept. 23, 1985.

Roofing contractor brought antitrust suit against materials supplier and against contractor's competitors alleging monopolization, price discrimination, and product tying, and seeking treble damages. The United States District Court for the Eastern District of Louisiana, Charles Schwartz, Jr., J., 597 F.Supp. 285 entered summary judgment against roofing contractor, and appeal was taken. The Court of Appeals, Robert Madden Hill, Circuit Judge, held that: (1) roofing contractor, which did not produce any evidence tending to show "antitrust injury" beyond evidence of price difference, could not recover in suit under section 4 of Clayton Act, and (2) defendants were entitled to award of expenses, attorney fees, and double costs against roofing contractor and its appellate counsel for frivolous appeal.

Affirmed and remanded.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before REAVLEY, TATE and HILL, Circuit Judges.

ROBERT M. HILL, Circuit Judge:

Appellants brought this antitrust action alleging claims of monopolization and attempted monopolization, unreasonable restraint of trade, price discrimination, and product tying. We affirm the district court's entry of summary judgment for the appellees, 597 F.Supp. 285, and because this appeal is so clearly frivolous, we assess expenses, attorneys' fees, and double costs against the appellants and their appellate attorney.

1. PROCEDURAL BACKGROUND AND FACTS

We note initially that for puposes of a motion for summary judgment all facts and inferences must be viewed in the light most favorable to the party opposing the motion. *United States v. Diebold*, 369 U.S. 654, 655, 82 S.Ct. 993, 994 8 L.Ed.2d 176 (1962). Summary judgment evidence is generally composed of the pleadings, depositions, answers to interrogatories, and admissions on file, together with any supporting affidavits. Fed.R.Civ.P. 56(c). Here, the district court ordered the parties to consolidate all factual contentions, claims for relief, defenses, and other affirmative matters in respective pretrial statements. The court specified in its order that any such matters not set forth in the pretrial statements would be deemed abandoned or withdrawn. We therefore evaluate the facts and contentions of the parties as reflected in the pretrial statements.

Appellants, Olympia Company, Inc., and Olympia Roofing Company, Inc., (hereinafter jointly referred to as Olympia) engaged in the business of securing roofing jobs and furnishing roofing services within the New Orleans area. In doing so, Olympia purchased roofing materials from appellee the Celotex Corporation (Celotex) and its business predecessors. Among Olympia's competitors were appellees Standard-Taylor Industries, Inc., (whose chief executive officer was appellee Robbins Taylor) and Standard Roofing Company of New Orleans, Inc., (whose chief executive officer was appellee Pierre F. Carriere) (hereinafter all such entities and individuals are jointly referred to as Standard).

For several years, Olympia was on Celotex's approved roofers list. This enabled Olympia to secure a Celotex roofing bond for any roof that was installed and repaired by an approved roofer using Celotex's materials in accordance with Celotex's specifications. According to Olympia, such roofing bonds were required by architectural specifications for virtually all large commercial roofing jobs, and by 1974 Celotex's roofing bonds were superior to those offered by competing suppliers of roofing materials in the New Orleans area.

Due to a dispute over credit terms, Celotex deleted Olympia from the list of approved roofers entitled to Celotex roofing bonds. According to Olympia, Celotex thereafter refused to deal with Olympia on the same terms offered Standard. Celotex continued to sell roofing supplies to Standard and to offer to Standard the Celotex roofing bonds. Olympia alleged that Standard was granted lower prices on certain materials by Celotex than those granted to Olympia, with an overall price differential of five percent. Olympia further alleged that Celotex obtained a dominant position in the relevant market, enjoying a more than

sixty percent market share.

Olympia filed this action in 1976. As consolidated in its pretrial statement, Olympia allegations were that Celotex and Standard committed the following violations of the antitrust laws: (1) monopolization and attempted monopolization of the relevant markets, (2) unreasonable restraint of trade within the relevant markets, (3) unlawful price discrimination, and (4) unlawful tying of the furnishing of roofing bonds to the sale of roofing materials. Olympia's pretrial statement implied that Celotex and Standard conspired, but there was no specific allegation to that effect. Olympia sought treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15.

The ensuing litigation had an extended history in the district court, as evidenced by eleven volumes of record and six boxes of exhibits. During the four years following 1976, the case produced extensive discovery, several amendments to the complaint, a number of changes in Olympia's counsel and numerous extensions and continuances. On January 7, 1980, Celotex's and Standard's motions for summary judgment were ordered continued to allow Olympia another change of counsel for the purpose of clarifying the issues. It was on June 17, 1980, that the district court ordered the parties to file pretrial statements relating all facts and legal contentions. The Court accepted Olympia's pretrial statement, although it was filed over four months late and subsequently amended twice.

The district court entered summary jmudgment for Celotex and Standard on all of Olympia's claims. The accompanying exhaustive opinion found that Olympia failed to produce evidence of antitrust injury or damages, and that Olympia failed to produce evidence to establish two or more necessary elements of each of the substantive claims.

Olympia appealed and again changed attorneys. Additionally, Olympia has filed a "Motion to Include Material Into the Appeal Record not Presented to District Court." Finally, Celotex and Standard request that this court impose sanctions against Olympia and its appellate counsel for filing a frivolous appeal.

II. REQUIREMENT OF INJURY AND DAMAGES

[1-3] Section 4 of the Clayton Act limits treble damages to a private litigant "who shall be injured in his business or property by anything forbidden in the antitrust laws." 15 U.S.C. § 15. Such a plaintiff must prove not only an antitrust violation, but also "cognizable injury attributable to the violation, and . . . at least the approximate amount of the damage." *Chrysler Credit Corp. v. J. Truett Payne Co. Inc.*, 670 F.2d 575, 579 (5th Cir.), *cert. denied.* 459 U.S. 908, 103 S.Ct. 212, 74 L.Ed.2d 169 (1982). In particular, the plaintiff must prove "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977) (emphasis in original). Injury is required in section 4 actions regardless of the nature of the underlying antitrust violation. *See Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300, 304-05 (5th Cir.) *cert. denied*, — U.S. —, 105 S.Ct. 123, 83 L.Ed.2d 65 (1984) (monopolization, attempted monopolization, conspiracy in restraint of trade); *Chrysler Credit Corp.*, 670 F.2d at 579 (price discrimination); *Cash v. Arctic Circle, Inc.*,85 F.R.D. 618, 622 (E.D.Wash.1979) (tying). While summary judgment is to be used cautiously in complex antitrust litigatiion, it is nevertheless available where no antitrust injury or damages have been presented. *See Bayou Bottling,* 725 F.2d

at 303-05.

Olympia's theory of antitrust injury can be easily summarized. In its pretrial statement, the only element of injury or damages that Olympia attempted to identify and quantify was that attributable to the alleged price discrimination. Olympia stated that had it received the same five percent price reduction that Standard allegedly received, it would have made an increased profit of $38,157.65 from 1972 to 1976, and its sales would have increased by forty percent. However, in its pretrial statement Olympia failed to point to any evidence that would bear out this calculation. Instead, Olympia "propose[d] to offer proof of damages using this basic methodology and employing a ten year 'straightline' projection of sales and loss [sic] net profits for a 'future' period of ten years from and after 1976." Olympia on appeal has not presented any different theory of injury or damages, nor does it cite to any evidence that it contends creates a dispute of fact.

[4] We agree with the district court's finding that Olympia's "claim of injury and for damages amounts to nothing more than unsupported assumptions, conclusory allegations, and undocumented hypotheses." Olympia has not produced any evidence tending to show antitrust injury beyond evidence of price difference. It states in its briefs, without any accompanying explanation, that affidavits that it filed in 1979 were sufficient to avoid summary judgment, but these materials contain no information relevant to injury or damages.[1] Olympia's proposed methodology is insufficient to survive a summary judg-

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[1] Olympia summarized its argument by claiming that "countervailing affidavits" filed in 1979 were sufficient to avoid summary judgment. These allegations were abandoned to the extent Olympia (failed to include them in the pretrial statement, and in any event the materials Olympia referred to contain no information relevant to the issues of injury and damages.

ment motion absent allegations of, and evidence to support, the fact of injury, which are not to be found in this voluminous record. Because Olympia apparently chose to rest upon its pleadings on this issue rather than substantiate its claims with evidence, summary judgment is permissible. *See* Fed. R. Civ.P. 56(e). Since Olympia created no genuine issue of the material matters of injury and damages, and since Celotex and Standard were entitled to judgment as a matter of law, the district court's entry of summary judgment was appropriate. *See* Fed.R. Civ.P. 56(c).

[5] Moreover, evidence of price discrimination is not, by itself, adequate evidence of damages. "[P]roof of a [price discrimination] violation does not mean that a disfavored purchaser had been actually 'injured' within the meaning of § 4" of the Clayton Act. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562, 101 S.Ct. 1923, 1927, 68 L.Ed.2d 442 (1981). "Price difference without more does not indicate the amount of lost sales or profits." *Chrysler Credit Corp.*, 670 F.2d at 582. Olympia cannot rely on "mere speculation and guesswork" to substantiate its damages. *See id.* Olympia's bare projection of future profits is insufficient to meet its evidentiary burden. Any coincidental financial problems Olympia may have suffered at the time the alleged price discrimination occurred is not by itself enough to demonstrate antitrust injury. *See id.* at 581-82.

[6] Even if Olympia had been able to factually substantiate its claims, its theory of damages would be unacceptable. Olympia may not base its damage claim on calculations showing what would have occurred had it received an allegedly discriminatory price. *See M.C. Manufacturing Co., Inc. v. Texas Foundries*, 517 F.2d 1059, 1063-65 (5th Cir. 1975), *cert. denied*, 424 U.S. 968, 96 S.Ct. 1466, 47 L.Ed.2d 736 (1976). Instead, Olympia must show

what would have happened had there been no discriminatory prices granted to Standard. *Id.* at 1064. Olympia cannot show damages merely by stating that it would have benefited by sharing in the lower, discriminatory prices with Standard. This is because

> [r]estoration of the competitive freedom which the Sherman Act is designed to protect through elimination of the anti-competitive practice is accomplished here by disregarding the special conspiratorial price . . ., not by hypothetical broadening of the conspiracy to give [the defendant/buyer's] abnormally low price to [the plaintiff] as well.

Id. at 1065.[2]

III. FRIVOLOUS APPEAL

[7] Standard and Celotex request the award of damages and double costs as sanctions against Olympia and its attorney for the filing of a frivolous appeal. Such an award may be made against an appellant under 28 U.S.C. § 1912 and Fed.R. App.P. 38, and against an attorney under 28 U.S.C. § 1927.[3] *See Hagerty v. Succession of*

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[2] Olympia also makes the frivolous argument that a recently passed Louisiana statute, La.Rev.Stat.Ann. § 39:1963(C) (West Supp. 1985), shows a five percent price differential to be a "devastating advantage." This statute requires certain public contracts be awarded to minority business that bid within five percent of the lowest bidder. How this statute can show that Olympia suffered any damage escapes us.

[3] 28 U.S.C. § 1927 entitled Counsel Liability for Excessive Costs provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the

Clement, 749 F.2d 217, 221-22 (5th Cir.1984). A frivolous appeal is one which "involves legal points not arguable on their merits." *Id.* at 222 (citing *Howard v. King*, 707 F.2d 215, 220 (5th Cir.1983)). Sanctions against Olympia's appellate counsel are available if he has acted "unreasonable and vexatiously" to multiply the proceedings in this case. *See* 28 U.S.C. § 1927.

[8] We have no difficulty in concluding that Olympia and its appellate counsel should be jointly assessed the sanctions of expenses, attorneys' fees, and double costs in connection with this appeal. Olympia has failed to produce any evidence of antitrust injury and its theory of damages has been expressly rejected by this Court in prior case law. Olympia's appellate counsel had made virtually no effort to point to evidence raising a genuine issue of material fact. His rambling briefs include citations to affidavits in the record which have little to do with the issues in this case, and which are unaccompanied by any explanation of what relevant evidence the cited affidavits supposedly contain.

Additionally, Olympia's appellate counsel made no attempt to address most of the issues raised in the district court's opinion. While we realize that the lack of damages or injury was enough to dispose of Olympia's action, we

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(Footnote 3 continued)

proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1912 entitled Damages and Costs on Affirmance provides:

Where a Judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

Rule 38 of the Federal Rules of Appellate Procedure entitled Damages for Delay provides:

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

note that Olympia did not address enough of the requisite elements to obtain reversal on any of its substantive claims.[4] Instead, Olympia's appellate counsel's main concern appears to be the possibility of succeeding in a future malpractice action against one of Olympia's prior attorneys. Olympia also calls on this court to, among other things, stay bankruptcy proceeding against a non-party in order to allow deposition of one of its employees, although it fails to explain how or why we should take such action. Many, if not most, of Olympia's arguments are similarly puzzling and exasperating. We are hard pressed to imagine a more meritless, vexatious, or unreasonable appeal.

We therefore grant the appellees' requests for expenses, attorneys' fees, and double costs against Olympia and its appellate counsel. However, rather than our determining the amount of expenses and attorney's fees incur-

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[4] Aside from the issue of damages, the district court dismissed Olympia's claims on the following grounds:

> *Monopolization:* no adequate evidence of the relevant market, no evidence that Celotex possessed monopoly power, and no evidence that the alleged monopoly resulted from actions of Celotex, rather than those of its competitors; *Attempted monopolization:* no evidence of intent and no evidence of relevant market;
> *Price discrimination:* no evidence of discriminatory prices, no evidence that alleged discrimination had a substantial effect on competition, no evidence that alleged price differences were not simply good faith attempts to meet competitors' prices, and no evidence that Standard was aware of any discrimination; *Tying:* the allegedly tied products were not separate products; and
> *Conspiracy to restrain trade:* no evidence of conspiracy.

Olympia's arguments on appeal are very difficult to decipher, but the only issues other than damages that it expressly addresses are relevant market, the existence of price differences, and conspiracy. As to the latter, Olympia makes no attempt to point to evidence that a conspiracy existed. We do not reach the substantive claims and express no opinion thereon, but we note these issues to illustrate the frivolousness of the appeal.

red by appellees in this appeal, we remand to the district court for such determination. *See Hagerty*, 749 F.2d at 223; *Lewis v. Brown & Root, Inc.* 722 F.2d 209, 210 (5th Cir.), *cert. denied*, — U.S. —, 104 S.Ct. 975, 79 L.Ed.2d 213 (1984).

IV. SUMMARY

We affirm the district court's entry of summary judgment for the appellees. Due to the frivolous nature of this appeal, we grant appellees' requests to assess expenses, attorneys' fees, and double costs jointly against the appellants and their appellate counsel. We remand this case to the district court for a determination of the amount of expenses incurred on appeal and appellees' appellate attorneys' fees.

Judgment **AFFIRMED: REMANDED** for assessment of expenses and attorneys' fees.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Feb 19-'86

OLYMPIA COMPANY, INC. ET AL CIVIL ACTION

VERSUS NO. 76-373

THE CELOTEX CORPORATION ET AL SECTION "A"

J U D G M E N T

Considering the Court's Order and Reasons dated February 13, 1986, accordingly:

IT IS ORDERED, ADJUDGED, AND DECREED, that the Court awards recovery for 109.5 hours of attorney work at $100.00 per hour, or $10,950.00; 7.5 hours of paralegal work at $20.00 per hour for a total of $150.00 and costs in the amount of $437.86, for a total of $11,537.86 with interest to run from date of judgment.

New Orleans, Louisiana, this 18th day of February, 1986.

/s/ Loretta G. Whyte
LORETTA G. WHYTE, CLERK

APPROVED AS TO FORM:

/s/Charles Schwartz, Jr.
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY FEB 19 1986

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FEB. 4 '86

OLYMPIA COMPANY INC., ET AL CIVIL ACTION

VERSUS NO. 76-0373

THE CELOTEX CORPORATION, ET ALSECTION "A"

ORDER & REASONS

SCHWARTZ, J.

This matter is before the Court upon remand from the Fifth Circuit Court of Appeals for a determination of the amount of expenses, attorneys' fees and costs to be awarded to defendants in light of the Appellate Court Opinion of September 23, 1985. A hearing was held on January 22, 1986, at which time the Court heard argument upon the submissions of defendant Celotex Corporation under Local Rule 21.16. For the reasons explained more fully below, the Court finds that defendant Celotex is entitled to a total award of $11,537.86 representing its expenses and attorneys' fees incurred in connection with the appeal in this matter.

In making its determination as to the quantum of recovery herein, the Court is bound by the Fifth Circuit's decision in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). Accordingly, the Court will address each of the *Johnson* factors for awards of attorney's fees in the order set forth in that decision:

(1) The Court first considered Celotex's claims for recovery of a total of 117.75 hours work in connection with

DATE OF ENTRY Feb 16 1986

the appeal. The Court has carefully reviewed the time records submitted by the defendant and concludes that defendant is entitled to recover fees pertaining to 117 hours of the amount claimed. In making this determination, the Court has discounted .75 hours claimed for review of the work performed by the trial attorney for Celotex, Mr. Frazier, by another member of his firm. The Court finds such review to have been an unnecessary duplication of effort. At the same time, the Court finds reasonable Mr. Frazier's fee of $100.00 per hour, particularly in light of Mr. Frazier's ten years experience in practice and in light of amounts charged by other attorneys in the city.

Included within the 117 hours, is the allowance of 7.5 hours work done by a paralegal employed by Mr. Frazier's firm. A review of the time records submitted by Celotex shows the paralegal work encompassed primarily organizational and court run duties, in contrast to Mr. Frazier's time spent drafting the brief to be submitted to the Fifth Circuit and preparing and attending argument in connection with the appeal. Thus, the paralegal work will be recoverable in the amount of $20.00 per hour, instead of the $35.00 per hour amount claimed by defendant Celotex.

(2) The instant matter was an anti-trust claim alleging monopolization, price discrimination and product tying. While such issues are not new to the courts, they are difficult, and proper evaluation and presentation of the factual setting and legal theories inherent in such claims require time and expertise. Accordingly, the Court finds the amount of time devoted to the appeal proportionate to the difficulty of the issues inherent in the litigation.

(3) As indicated above, litigation of this type does require certain skill to perform the legal service properly, as does the presentation of briefs and argument to the Fifth

Circuit Court of Appeal. This Court has also observed Mr. Frazier's demeanor at the hearings and finds his fee to be reasonable in light of his expertise.

(4) There has been no showing or argument that other employment was precluded due to the acceptance of this case. Accordingly, no particular premium for or consideration of this factor is warranted.

(5) The Court finds Mr. Franzier's fee reasonable and within the range of customary fees charged in a New Orleans community. However, the Court finds the $35.00 per hour fee claimed for paralegal services excessive in this case, where there was no showing of any special expertise by the paralegal nor any showing as to her salary and cost to the firm. Accordingly, the Court has taken judicial cognizance that paralegals in the New Orleans community may earn anywhere between $14,000 and $26,000 annually, with an approximate hourly salery of $10.00-$18.00 per hour. Thus, the Court concludes that the actual cost of paralegal employment to a firm in this community approximates $20.00 per hour, giving some leeway for benefits afforded the paralegal as part of his or her employment. The Court does not deem it appropriate to award a law firm the same profit margin for the services of a paralegal as a firm would be entitled for the services of a lawyer. Accordingly, the amount awarded for paralegal services is reduced from the claim of $35.00 per hour to $20.00 per hour.

(6) Consideration whether the fee is fixed or contingent in this case is rendered academic by the charge to the client of a fee on an hourly basis which this Court finds reasonable. In addition, the fee in this case must be evaluated from a defense standpoint, in light of customary hourly billing for defense work.

(7) The Court does not find any particular premium necessitated by any time limitations imposed by the client or the circumstances and accordingly, limits recovery to a reasonable fee for the actual hours of work recorded.

(8) Plaintiff demanded one million dollars for actual and treble damages under state and federal anti-trust laws. Celotex obtained a dismissal of plaintiff's claims. These considerations generally support the Court's determination that the hours invested by Mr. Frazier were reasonable and the charge for those hours was likewise reasonable.

(9) The Court finds Mr. Frazier's hourly fee of $100.00 per hour appropriate in light of his experience, as discussed above.

(10) The undersirability of this case does not require any special permium or consideration by this Court.

(11) Likewise, the Court does not find that the nature and length of the professional relationship with the client warrants any special consideration in this case.

(12) There has been no showing or discussion of awards made in similar cases for appellate work alone. However, on the basis of the Court's experience, the Court finds that the amount of time devoted by Mr. Frazier is reasonable.

The statements submitted by Celotex also set forth an expenditure of $613.36 in expenses. Of that amount, $175.50 in costs has already been assessed against plaintiff and in favor of Celotex by the Appellate Court. Accordingly, the Court awards to defendant additional costs in the amount of $437.86. Plaintiff does not challenge the reasonableness of these costs or their necessity as part of defendant's preparation for the appeal.

For the foregoing reasons, the Court awards recovery for 109.5 hours of attorney work at $100.00 per hour, or $10,950.00; 7.5 hours of paralegal work at $20.00 per hour for a total of $150.00 and costs in the amount of $437.86, for a total of $11,537.86 with interest to run from date of judgment. The Clerk of Court is hereby ordered to enter judgment accordingly.

New Orleans, Louisiana, this *13th* day of February, 1986.

/s/ illegible
UNITED STATES DISTRICT COURT

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Oct 12 -'88

OLYMPIA COMPANY, INC. CIVIL ACTION
OLYMPIA COMPANY, INC., ET AL

VERSUS NO. 76-373

THE CELOTEX CORPORATION ET AL SECTION "A"

MOTION AND ORDER FOR RELEASE OF EXHIBITS

NOW INTO COURT, through undersigned counsel, comes Olympia Roofing Company, Inc., et al, and respectfully moves this Court to issue an Order to release for inspection and duplication to the petitioner herein upon a signed custody receipt the exhibits submitted to resist Summary Judgment in the above named and numbered cause, said exhibits having been in storage and now in the custody of the Clerk, United States District Court, Eastern District of Louisiana.

A Memorandum accompanies this Motion.

Respectfully submitted,

/s/W. J. Manion

W. J. MANION
Attorney for Plaintiffs
P. O. Box 1776
Slidell, LA 70459
(504) 649-4000

ORDER

Presented for consideration and determination in regards to plaintiffs' Motion herein;

IT IS ORDERED that the Clerk of Court, United States District Court, Eastern District of Louisiana, release for inspection and duplication the exhibits filed with this section upon custody receipt, and said exhibits are to be returned to the Clerk of Court within 21 days from the date of this Order.

New Orleans, LA, this 12th day of October, 1988.

/s/ illegible

DISTRICT JUDGE

CERTIFICATE

I certify that a copy of this Motion and Order will be mailed to Jack N. Price, 410 Congress Avenue, Austin, TX 78701.

/s/ W. J. Manion

W. J. MANION

RECEIVED 5 BOXES OF EXHIBITS AS PER ATTACHED LISTS THIS *14* DAY OF OCTOBER, 1988.

BY: /s/ W. J. Manion

W. J. Manion, Esq.

DATE OF ENTRY OCT 17 1988

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
Filed MAR 1 -1989

No. 84-3850

USDC #CA 76-373 A

OLYMPIA COMPANY, INC. and
OLYMPIA ROOFING COMPANY, INC.,
Plaintiffs-Appellants;

versus

THE CELOTEX CORPORATION, ET AL.,
Defendants-Appellees.

- - - - -

Appeals from the United States District Court for the
Eastern District of Louisiana

- - - - -

O R D E R:

IT IS ORDERED that the motion of appellants to recall the judgment of this Court has to remand the cause to the district court for a new trial is DENIED.

/s/ THOMAS M. REAVLEY
UNITED STATES CIRCUIT JUDGE

APPENDIX F

OLYMPIA ROOFING CO., INC. CA-8909
OLYMPIA COMPANY, INC. TRAILER
TRUCK BODIES, PARTS COURT OF APPEAL
AND SERVICE, INC., ET AL

FOURTH CIRCUIT

VERSUS

C. ELLIS HENICAN, SR. AND STATE
LAW OFFICE OF HENICAN, OF
JAMES & CLEVELAND LOUISIANA

AN APPEAL FROM THE CIVIL DISTRICT COURT, PARISH OF ORLEANS NO. 77-3453, DIVISION "H", HONORABLE REVIUS O. ORTIQUE, JR., JUDGE

* * * * * * * * * * * * *

WILLIAM H. BYRNES, III
JUDGE

* * * * * * * * * * * * *

(Court composed of Judges William H. Byrnes, III, David R. M. Williams, and Steven R. Plotkin)

OCT 11 1989

SESSIONS, FISHMAN, ROSENSON,
BOISFONTAINE, NATHAN & WINN
JACK M. ALLTMONT
New Orleans, Louisiana
Attorneys for Defendants-Appellees

W. J. MANION
P. O Box 1776
Slidell, Louisiana
Attorney for Plaintiffs-Appellants

AFFIRMED

Appellants, Olympia Company, Inc. Olympia Roofing Company and Trailer Truck Body Parts and Service Inc., brought this negligence action alleging that the testimony of appellee, C. Ellis Henican, during a lawsuit previously brought by Olympia Roofing Company, Inc. against the City of New Orleans, caused the dismissal of that lawsuit. We affirm the district court's granting of appellees' Motion for Summary Judgment. Further, because we find this appeal to be frivolous we assess $2,500.00 as damages, plus court costs, against appellants and their appellate attorney.

FACTS

This appeal arises out of two lawsuits filed by appellants. The first, filed in 1977, contained allegations by appellants against Mr. Henican Concerning the allegedly false testimony he gave in an earlier suit brought by Olympia Roofing Company Inc. against the City of New Orleans and the UPT. It was alleged that, at the trial of this earlier matter Mr. Henican testified that the proper name for the plaintiff in that action was Olympia Company, Inc. not Olympia Roofing Company, Inc. Subsequently, that suit was dismissed for failure to name the proper party plaintiff. Appellants herein contend that the dismissal in the earlier suit against the City was due to Mr. Henican's allegedly false testimony regarding the correct name of Olympia. Rather than cure the relatively minor defect in the prior suit by amending the petition or appealing the judgment of dismissal, appellants instead filed suit in 1977 against Mr. Henican. With the exception of four amending petitions the 1977 suit remained inactive for seven years until Mr. Henican filed a Motion for Summary Judgment in 1984. The Judge referred the Motion to the merits and set the case for trial before a Commissioner on March 15, 1985. Prior to this trial date appellants filed a second suit

attempting to revive its previously dismissed claims against the City and the UPT. The 1985 suit also realleged the claims against Mr. Henican as an alternative to recovery from the City and the UPT.

Both suits were apparently consolidated and in March, 1987 Mr. Henican re-urged his previously filed Motion for Summary Judgment. The Motion was heard in April, 1987 before a Commissioner. The Commissioner recommended granting the Motion which recommendation was adopted by the District Court on May 1, 1987. The Judgment was amended, due to an apparent clerical error, to reflect that the dismissal of appellants' claims against Mr. Henican was effective as to both the 1977 and 1985 suits, as consolidated. Appellants' Motion for a New Trial was denied and this appeal followed.

LAW

Louisiana Code of Civil Procedure Article 966(b) provides in pertinent part, as follows:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law." (emphasis added)

It is well settled that summary judgment should only be granted when reasonable minds must inevitably concur that there exist no genuine issues of material fact. *Whitney v. Maltet*, 442 So.2d 1361 (La. App. 3rd Cir. 1983), *writ den* 445 So.2d 437. All reasonable doubts as to the propriety of the summary judgment are to be resolved against granting the motion and in favor of trial on the merits.

American Bank & Trust Co. v. Sunbelt Environmental Systems, Inc., 451 So.2d 1111 (La. App. 1st. Cir. 1984); *Other v. Sharp ELectric, Inc.*, 451 So.2d 1235 (La. App. 4th Cir. 1984). In considering the motion the trial court should look to the pleadings, depositions and other documents of record to determine the existence of a genuine issue of material fact. *Otter v. Sharp Electric, Inc., supra; Kerwin v. Nu-Way Construction Service, Inc.*, 451 So.2d 1195 (La. App. 5th Cir. 1984). Additionally, it has been held that one purpose of the summary judgment is to dispose of frivolous claims. *Schaefer v. Lynch*, 406 So.2d 185 (La. 1981). Although summary judgments are not generally favored we have reviewed few, if any, cases more deserving of summary disposition than the case at bar.

After sifting through appellants' "brief" and separating out the primarily superfluous and purely vindictive statements it is abundantly clear that the only material fact in this lawsuit concerns set out many other supposedly material facts, it is solely the allegedly false testimony of the attorney that forms the entire basis for the case before this court.

William J. Manion, who is not only appellants' attorney, but, also the President of Olympia Company, Inc. testified unequivocally that as President of Olympia Company he had no quarrel with the way in which Mr. Henican or his law firm handled Olympia's corporate affairs. Manion testified further that the sole basis of the instant law suit was Mr. Henican's testimony at trial in 1976. (Manion deposition at pp. 30-31, 33, 34 and 45-46).

Thus, the sole material fact concerns the content of that testimony. The only question before us, then, for purposes of determining the propriety of granting the summary judgment is whether this genuine issue was in

dispute. We find that it was not.

We do not have the transcript from the 1976 trial before us. This is apparently due to Mr. Henican's failure to timely request same following the trial. The record before us, however, contains sufficient evidence of Mr. Henican's testimony at that trail. As noted above, Mr. Manion testified that the proper party plaintiff to the earlier lawsuit was Olympia Company Inc. and not Olympia Roofing Company, Inc. Moreover, Mr. Henican does not dispute that this was the content of his 1976 testimony. Clearly, then, the actual content of Mr. Henican's testimony is not in dispute and therefore is not an *issue* of material fact. Similarly, the record supports the finding that the veracity of Mr. Henican's testimony is likewise not in dispute.

The record contains copies of the annual reports of "Olympia Company Inc." encompassing the years 1972-1982. These reports were filed with the Secretary of State and signed by Mr. Manion. Moreover, Mr. Manion testified regarding the name change in 1969 from Olympia Roofing to "Olympia Company, Inc." and the fact that the name was still "Olympia Company, Inc." at the time of Mr. Henican's testimony. Mr. Manion specifically testified at pp. 31-32 of his deposition, as follows:

> "Q. Let me ask you this. You filed with the court an affidavit. It was filed May 25, 1978, and the affidavit is four pages signed by you and dated May 24, 1978. Is this, in fact, your signature?
>
> A. That's my signature.
>
> Q. And in that affidavit you appear to state that subsequent to the name change of the company March 27, 1969, that's when it was changed to Olympia Company, Inc.?
>
> A. Yes.

Q. There were discussions about changing the name back to Olympia Roofing Company, Inc.

A. No question about that.

Q. But to your knowledge that was never done?

A. Never done.

Q. And you knew that was never done?

A. I had never been informed. I never signed any papers to that effect.

Q. Had the name of the company ever been changed before without you signing it?

A. No. I have said that I have no quarrel with that."

Thus, it is clear that Mr. Henican testified truthfully and accurately about the status of Olympia at the 1976 trial. Accordingly, we find there is no genuine issue of material fact and therefore, summary judgment was proper.

DAMAGES FOR FRIVOLOUS APPEAL

Appellees request that we award damages and costs as sanctions against appellants for filing a frivolous appeal. Louisiana Code of Civil Procedure Article 2164 provides:

> "The appellate court shall render any judgment which is just, legal and proper upon the record on appeal. The court may award damages for frivolous appeal; and may tax the costs of the lower or appellate court, or any part thereof,

> against any party to the suit, as in its judgment may be considered equitable."

In *Parker v. Interstate Life & Accident Insurance Company*, 248 La. 449, 179 So.2d 634, 637 (1965) the court held:

> "[W]hen counsel proclaims his sincerity, a court finds itself without just cause to disbelieve unless, and only unless, the proposition advocated is so rediculous or so oppossed to rational thinking that it is evident beyond any doubt that it is being deliberately professed for ulterior purposes."

See also, *Rogers v. D'Hubin*, 498 So.2d (La. App. 1st. Cir. 1986.) The instant appeal presents just such a case.

Mr. Manion and Olympia are no strangers to the frivolous appeal. In *Olympia Co. Inc. v. Cleotex Corp.*, 771 F. 2d 888, 893 (5th Cir. 1985) the court found that *Cleotex* was entitled to damages for frivolous appeal and stated:

> "Olympia's appellate counsel has made virtually no effort to point to evidence raising a genuine issue of material fact. His [Manion's] rambling briefs include citations to affidavits in the issue in this case, and which are unaccompanied by any explanation of what relevant evidence the cited affidavits supposedly contain.
>
> "Olympia's appellate counsel's main concern appears to be the possibility of succeeding in a future malpractice action against one of Olympia's prior attorneys.
>
> * * * *
>
> Many, if not most, of Olympia's arguments

> are...puzzling and exasperating. *We are hard pressed to imagine a more meritless, vexatious or unreasonable appeal.*" (emphasis added)

What was difficult to imagine for our Bretheren on the Federal Bench has now come to pass.

As in *Celotex* the record before us contains rambling briefs and unsupported allegations. Once again, Mr. Manion's chief concern appears to be laying the groundwork for some future malpractice action against one of Olympia's prior attorneys, Mr. Henican.

There is no dispute over the content of Mr. Henican's prior testimony. There is no evidence to support a dispute over the veracity of that testimony. Yet, despite the overwelming evidence, including Mr. Manion's own testimony, appellate put forth paragraph after paragraph of meaningless and irrelevant allegations in a clear attempt to cloud the issues. Therefore because there is no evidence and law in dispute, this appeal is frivolous; entitling the appellees to damages for a new appeal.

Accordingly, we affirm the judgment of the trial court and award $2,500.00 as damages plus costs of this appeal.

AFFIRMED

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, New Orleans, **DEC 14 1988**, 198_____

DEAR SIR:

REHEARING WAS THIS DAY REFUSED IN THE CASE ENTITLED

OLYMPIA ROOFING CO., INC., ET AL VS C. ELLIS HENICAN, SR., ET AL

No. **CA-8908**

APPENDIX G

MINUTE ENTRY
FEBRUARY 9, 1989
SCHWARTZ, J.

FILED
Feb 8 89

OLYMPIA COMPANY, INC. CIVIL ACTION

VS. NO. 76-373

THE CELOTEX CORPORATION, ET AL SECTION "A"

This matter is scheduled to come before the Court for hearing on the motion of plaintiffs for new trial. The Court is of the opinion no oral argument on the motion is necessary and the matter is hereby taken under submission without oral argument.

This Court dismissed plaintiffs' claims on the merits on motion for summary judgment and was affirmed by the Fifth Circuit in 1985. *See Olympia Co. v. Celotex Corp.*, 597 F. Supp. 285, *Aff'd* 771 F.2d 888 (5th Cir. 1985). the gravamen of plaintiffs' motion for new trial is contradictory: On the one hand, plaintiffs allege they are entitled to a new trial because certain documents were not properly maintained under seal. On the other hand, plaintiffs allege the government improperly restricted and made difficult access to the documents in question.

The motion was apparently provoked by the return of certain boxes of sealed documents to the plaintiffs with the "seals broken". Plaintiffs also allege they were improperly denied access to their own documents in preparing their appeal.

DATE OF ENTRY FEB 9 1989

As to the first contention, plaintiffs misperceive the Clerk's actions in maintaining documents "under seal". the term "under seal" is a term of art, meaning only that the documents in question are not maintained as a matter of public record but are rather kept apart from the main record in a vault or other location not readily accessible to the public. the Clerk's office does not place any type of official wax or other seal on such documents, although it may from time to time tape boxes of documents closed. Thus, the "breaking of seals" on boxes has absolutely no significance whatsoever.

Moreover, even accepting as true plaintiffs' contention that none of the documents in question was entered into evidence, holding documents for in camera inspection by definition permits the Court to review in chambers any such documents it deems necessary for the resolution of a case. the same holds true for any reviewing JCourt. Such in camera review is not limited to reading the documents in the presence of counsel of record, but is accomplished whenever the JCourt deems it necessary to read a document. There has been no showing by the plaintiffs that any person outside of Court and government personnel involved in processing and handling JCourt records has had access to the documents in question. There has been no showing that any party filed a motion for leave to review documents held in camera and that such request was improperly granted.

Moreover, any matters inhibiting plaintiffs' preparation of their appeal should have been called to the JCourt's attention four years ago. The Court is also at a loss to perceive how the plaintiffs could have been prejudiced by the Court's holding their documents in storage, since the documents presumably belong to the plaintiffs, and presumably they as owners of the documents, would have been aware of their contents.

The motion for new trial is accoringly DISMISSED as frivolous.

- - - - -

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED
Apr 21 1989

No. 89-3181

OLYMPIA COMPANY, INC., and
OLYMPIA ROOFING COMPANY,

Plaintiffs-Appellants,

versus

THE CELOTEX CORPORATION, ET AL.,

Defendants-Appellees.

- - - - - - - - - - -

Appeal from the United States District Court
for the Eastern Distsrict of Louisiana

- - - - - - - - - -

Before GEE, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motions of appellees Celotex and Standard Roofing to dismiss the appeal and for sanctions are GRANTED pursuant to Local Rule 42.2 and 28 U.S.C. § 1927. the cause is remanded to the district court for the determination of an appropriate amount of attorneys fees, costs and expenses to be added to the award of sanctions which we enter here and paid personally by counsel for appellants, the Court having determined that

this entire proceeding constitutes an unreasonable and vexatious multiplication of litigation. And the Court having noted that an earlier award of sanctions in the mamount of $11,537.86 has not deterred appellant's counsel from instituting and persisting in this attempted resurrection of a long-dead matter, the Court awards a sanction of Fifteen Thousand Dollars in addition to the aforesaid § 1927 award pursuant to Rule 11, F.R.C.P. It is so

ORDERED.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

F I L E D

No. 89-3181

FILED
May 12 19889

OLYMPIA COMPANY, INC., and
OLYMPIA ROOFING COMPANY,
Plaintiffs-Appellants,

versus

THE CELOTEX CORPORATION, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

---

ON PETITION FOR REHEARING

(**May 12, 1989**)

Before GEE, WILLIAMS, and HIGGINBOTHAM, Circuit Judges.

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby **DENIED.**

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

APPENDIX J

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

GILBERT F. GANUCHEAU
CLERK

OFFICE OF THE CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA.70130

April 14, 1989

Mr. W. J. Manion
Attorney at Law
Slidell, LA 70459

No.

89-3181 - OLYMPIA CO., INC., ET AL., -vs -
THE CELOTEX CORP., ET AL.,

☐ An examination of your brief reveals that it fails to contain or comply with the following rules:

- ☐ Certificate of Interested Persons (Loc.R. 28.2.1)
- ☐ Statement Regarding Oral Argument (Loc.R. 28.2.4)
- ☐ Summary of Argument (Loc.R. 28.2.2)
- ☐ Certificate of Interested Persons does not comply with the intent of the Rule in that counsel are required to certify a *complete list* of *all* parties of interest on both sides of the case.

Supreme Court, U.S.
FILED
JUN 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2016

In The

Supreme Court of the United States

October Term, 1988

OLYMPIA COMPANY, INC. and
OLYMPIA ROOFING COMPANY, INC.

Petitioners,

v.

THE CELOTEX CORPORATION,
STANDARD-TAYLOR INDUSTRIES, INC.,
STANDARD ROOFING COMPANY OF NEW ORLEANS,
INC., ROBBINS TAYLOR, and PIERRE F. CARRIERE

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT THE CELOTEX CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. What criteria are to be employed in determining whether sanctions are impermissibly imposed to deter criticism of judicial misconduct?

2. Are the penalties and sanctions imposed on Petitioners in this case unconscionable in light of the lower courts' determinations that Petitioners' claims were frivolous?

3. Are there any circumstances in which examination by the judiciary of trial exhibits filed under seal could prejudice a party's constitutional right to a fair trial, and, if so, are those circumstances present here?

4. Does the failure of a Clerk of Court to timely return exhibits in accordance with Local Rules of Court violate the constitutional guarantee against unreasonable searches and seizures?

5. Is a Petition for a Writ of Certiorari filed four years after the Judgment sought to be reviewed timely?

LIST OF PARTIES AND AFFILIATED CORPORATIONS

The parties to the proceedings below were Petitioners Olympia Company, Inc. and Olympia Roofing Company, Inc., and Respondents The Celotex Corporation, Standard-Taylor Industries, Inc., Standard Roofing Company of New Orleans, Inc., Robbins Taylor, and Pierre F. Carriere.

The parent company of Respondent The Celotex Corporation is Jim Walter Corporation. Affiliates of The Celotex Corporation (other than wholly owned subsidiaries) are Jim Walter International Sales Corporation, Jim Walter Research Corp., JWC Holdings Corporation, Apache Building Products Company, and Jasper Corp.

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B. Memorandum Opinion in *Olympia Co. v. The Celotex Corp.*, No. 89-3181 (5th Cir. Apr. 21, 1989) A2

C. Memorandum Opinion in *Olympia Co. v. The Celotex Corp.*, No. 76-373 "A" (E.D. La. Feb. 8, 1989) A5

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No. 88-2016

In The

Supreme Court of the United States

October Term, 1988

OLYMPIA COMPANY, INC. and
OLYMPIA ROOFING COMPANY, INC.

Petitioners,

v.

THE CELOTEX CORPORATION,
STANDARD-TAYLOR INDUSTRIES, INC.,
STANDARD ROOFING COMPANY OF NEW ORLEANS,
INC., ROBBINS TAYLOR, and PIERRE F. CARRIERE

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT THE CELOTEX CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petition involves disputed issues of fact, concerns only settled principles of law, and presents no ground specified in Rule 17.1(a) of this Court. Accordingly, Respondent The Celotex Corporation respectfully requests that the Court deny the Petition for Writ of

Certiorari to Review the Decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 771 F.2d 888 (5th Cir. 1985). Memorandum decisions of that Court dated March 1 and April 21, 1989 have not been reported. They are reprinted in Appendices A and B of this Brief.

The opinion of the United States District Court for the Eastern District of Louisiana is reported at 597 F.Supp. 285 (E.D. La. 1984). The memorandum decision of that Court dated February 8, 1989 is reprinted in Appendix C of this Brief.

JURISDICTION

Petitioners' attempts to obtain review or reconsideration by the United States Court of Appeals for the Fifth Circuit of its decision reported at 771 F.2d 888 (5th Cir. 1985) were untimely and defective. That judgment is definitive, and the Petition is consequently untimely.

COUNTERSTATEMENT OF THE CASE

This case commenced on February 5, 1976 when Petitioners filed an action alleging, *inter alia*, that Respondents had engaged in conduct violating Sherman Act §§ 1 & 2, 15 U.S.C. §§ 1 & 2, Clayton Act § 2 (as amended by

the Robinson-Patman Act), 15 U.S.C. § 13, and Clayton Act § 3, 15 U.S.C. § 14. Petitioners sought treble damages from Respondents under Clayton Act § 4, 15 U.S.C. § 15. After over eight years of discovery, the District Court ruled that Petitioners had proved neither a violation of the antitrust laws, cognizable injury flowing from violation of those laws, nor damages. The Court accordingly granted Respondent's Motion for Summary Judgment on November 9, 1984, and Judgment dismissing the case with prejudice was entered on November 15, 1984. Petitioners perfected a timely appeal to the United States of Appeals for the Fifth Circuit, which affirmed on September 23, 1985. That Court also found the appeal frivolous and remanded the case for assessment of attorneys' fees and double costs against Petitioners and their counsel under Federal Rule of Civil Procedure 38 and 28 U.S.C. §§ 1912 and 1927. On January 22, 1986, a hearing on the amount of sanctions to be awarded was held, and on February 13, 1986 the District Court directed the Clerk of Court to enter a Judgment for Respondent's expenses and attorneys' fees. The Judgment was satisfied on March 12, 1986. Almost three years later, Petitioners filed documents captioned (a) "Motion and Order for New Trial and Recall of Sanctions and Penalties" in the Court of Appeals, and (b) "Motion for New Trial" in the District Court. On February 9, 1989, the District Court dismissed the Motion for New Trial as frivolous (Appendix C). On March 1, 1989, the Court of Appeals denied Olympia's Motion for New Trial and Recall of Sanctions (Appendix A). On March 14, 1989, the Court denied a Petition for rehearing of the March 1, 1989 Order. Despite the above, on March 7, 1989, Petitioners filed a Notice purporting to

appeal the decision of the District Court reported at 597 F.Supp. 285. Respondents' Motions to Dismiss were granted on April 21, 1989, and sanctions of $15,000 and attorneys' fees, costs, and expenses were imposed against Petitioners and their counsel under 28 U.S.C. § 1927 and Local Rule 42.2 of the United States Court of Appeals for the Fifth Circuit (Appendix B).

Rehearing was denied on May 12, 1989, and a Petition for Writ of Certiorari followed.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioners seek review of judgments that have long since become definitive. Even were that not the case, the Petition is demonstrably without merit. It is difficult to comprehend, let alone articulate, Petitioners' complaint. Apparently, Petitioners contend that Clerks and Judges of United States Courts either invaded Petitioners' privacy by examining Exhibits, denied them a fair trial by failing to do so, or were improperly influenced by materials submitted by Petitioners.

The opinions of the trial court and the Fifth Circuit illustrate that the claims Petitioners seek to resurrect lack legal and factual substance. All antitrust claims asserted in the underlying action involve only settled principles of law and most have been disposed of by recent decision. *E.g., Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984); *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981); *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69 (1979); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *United States v. Grinnell Corp.*, 384

U.S. 563 (1966); *United States v. E. I. du Pont De Nemours & Co.*, 351 U.S. 377 (1956). Consequently, Petitioners can make no colorable argument that they have been deprived of a fair trial by the misconduct of Judges, Clerks, or counsel. What, then, is left – a claim that Judges are barred by a Protective Order from examining documents submitted by litigants? Petitioners have identified no right, constitutional or otherwise, that could conceivably be violated by Judges reviewing Petitioners' own documents.

Similarly, Petitioners fail to explain what injury they have suffered. They lost a case because the law and facts were against them and they were deservedly penalized for taking frivolous appeals. Petitioners have never made the slightest showing that they were penalized for criticizing judicial misconduct. Whatever the nature of the injury Petitioners may be claiming, it is clear that it does not implicate the Constitution of the United States. Even if it arguably did, this is hardly the case to decide the matter.

The issues presented by this case are unclear and undeveloped. Petitioners' theories are illogical and self-contradictory. Any alleged constitutional violations are unlikely to occur again. The case concerns no general principles, but is limited to its peculiar facts. There is, quite simply, no reason to hear this case.

The trial judge and six judges of the United States Court of Appeals for the Fifth Circuit have on three occasions found Petitioners' attempts to appeal or reopen this case frivolous. Sanctions have been imposed by two different panels of the Fifth Circuit. The matter does not merit this Court's attention.

CONCLUSION

It is self-evident that the decisions of the District Court and the Court of Appeals reported at 597 F.Supp. 285 and 771 F.2d 888 are definitive. They are *res judicata* in the truest sense of the phrase. Petitioners do not purport to have discovered new evidence. Indeed, the Petition is expressly premised on old evidence. It is clear that the Petition is no more than an attempt to circumvent principles of repose established beyond need of citation. Petitioners' actions are in complete disregard of the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and Rules of Court. The Petition ought to be dismissed out of hand.

June 28, 1989

Respectfully submitted,

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Attorney for Respondent
The Celotex Corporation

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-3850

USDC #CA 76-373 A

OLYMPIA COMPANY, INC. and
OLYMPIA ROOFING COMPANY, INC.,

Plaintiffs-Appellants,

versus

THE CELOTEX CORPORATION, ET AL.,

Defendants-Appellees.

Appeals from the United States District Court
for the Eastern District of Louisiana
(Filed Mar. 1, 1989)

O R D E R:

IT IS ORDERED that the motion of appellants to recall the judgment of this Court and to remand the cause to the district court for a new trial is DENIED.

/s/ THOMAS M. REAVLEY
UNITED STATES CIRCUIT
JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-3181

OLYMPIA COMPANY, INC., and
OLYMPIA ROOFING COMPANY,

Plaintiffs-Appellants,

versus

THE CELOTEX CORPORATION, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(Filed April 21, 1989)

Before GEE, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motions of appellees Celotex and Standard Roofing to dismiss the appeal and for sanctions are GRANTED pursuant to Local Rule 42.2 and 28 U.S.C. § 1927. The cause is remanded to the district court for the determination of an appropriate amount of attorneys fees, costs and expenses to be added to the award of sanctions which we enter here and paid personally by counsel for appellants, the Court having determined that this entire proceeding constitutes an unreasonable and vexatious multiplication of litigation. And the Court having noted that an earlier award of sanctions in the

amount of $11,537.86 has not deterred appellant's counsel from instituting and persisting in this attempted resurrection of a long-dead matter, the Court awards a sanction of Fifteen Thousand Dollars in addition to the aforesaid § 1927 award pursuant to Rule 11, F.R.C.P. It is so

ORDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-3181

OLYMPIA COMPANY, INC., and
OLYMPIA ROOFING COMPANY,

Plaintiffs-Appellants,

versus

THE CELOTEX CORPORATION, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING
(May 12, 1989)

Before GEE, WILLIAMS, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Thomas Gibbs Gee
United States Circuit Judge

APPENDIX C

MINUTE ENTRY
FEBRUARY 9, 1989
SCHWARTZ, J.

OLYMPIA COMPANY, INC.

VS.

THE CELOTEX CORPORATION, ET AL

CIVIL ACTION
NO. 76-373
SECTION "A"

(Filed Feb. 8, 1989)

This matter is scheduled to come before the Court for hearing on the motion of plaintiffs for new trial. The Court is of the opinion no oral argument on the motion is necessary and the matter is hereby taken under submission without oral argument.

This Court dismissed plaintiffs' claims on the merits on motion for summary judgment and was affirmed by the Fifth Circuit in 1985. *See Olympia Co. v. Celotex Corp.*, 597 F.Supp. 285, *aff'd* 771 F.2d 888 (5th Cir. 1985). The gravamen of plaintiffs' motion for new trial is contradictory: On the one hand, plaintiffs allege they are entitled to a new trial because certain documents were not properly maintained under seal. On the other hand, plaintiffs allege the government improperly restricted and made difficult access to the documents in question.

The motion was apparently provoked by the return of certain boxes of sealed documents to the plaintiffs with the "seals broken". Plaintiffs also allege they were improperly denied access to their own documents in preparing their appeal.

As to the first contention, plaintiffs misperceive the Clerk's actions in maintaining documents "under seal".

The term "under seal" is a term of art, meaning only that the documents in question are not maintained as a matter of public record, but are rather kept apart from the main record in a vault or other location not readily accessible to the public. The Clerk's office does not place any type of official wax or other seal on such documents, although it may from time to time tape boxes of documents closed. Thus, the "breaking of seals" on boxes has absolutely no significance whatsoever.

Moreover, even accepting as true plaintiffs' contention that none of the documents in question was entered into evidence, holding documents for in camera inspection by definition permits the Court to review in chambers any such documents it deems necessary for the resolution of a case. The same holds true for any reviewing Court. Such in camera review is not limited to reading the documents in the presence of counsel of record, but is accomplished whenever the Court deems it necessary to read a document. There has been no showing by the plaintiffs that any person outside of Court and government personnel involved in processing and handling Court records has had access to the documents in question. There has been no showing that any party filed a motion for leave to review documents held in camera and that such request was improperly granted.

Moreover, any matters inhibiting plaintiffs' preparation of their appeal should have been called to the Court's attention four years ago. The Court is also at a loss to perceive how the plaintiffs could have been prejudiced by the Court's holding their documents in storage, since the documents presumably belong to the plaintiffs,

and presumably they, as owners of the documents, would have been aware of their contents.

The motion for new trial is accordingly DISMISSED as frivolous.

/s/ C.S. Jr.

Supreme Court, U.S.
FILED
JUL 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

3

NO. 88-2016

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

OLYMPIA ROOFING COMPANY, AND OLYMPIA COMPANY, INC., ET AL
Petitioners

v.

THE CELOTEX CORPORATION, STANDARD-TAYLOR INDUSTRIES, INC., STANDARD ROOFING COMPANY OF NEW ORLEANS, INC., ROBBINS TAYLOR, AND PIERRE F. CARRIERE, ET AL
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

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LIST OF PARTIES AND AFFILIATED CORPORATIONS

Petitioners/Plaintiffs/Appellants:

Olympia Company, Inc.; Olympia Roofing Company

Non-Party/Petitioners' Counsel:

W. J. Manion

Respondents/Defendants/Appellees:

Standard-Taylor Industries, Inc.; Standard Roofing Company of New Orleans, Inc.; Robbins Taylor; Pierre F. Carriere; The Celotex Corporation and its parent company, Jim Walter Corporation; Affiliates of The Celotex Corporation (other than wholly owned subsidiaries) are Jim Walter International Sales Corporation, Jim Walter Research Corp., JWC Holdings Corporation, Apache Building Products Company, and Jasper Corp.

Others:

Johns-Manville Sales Corporation; Clerk, U.S. Civil District Court, Eastern District of Louisiana; Clerk, U.S. Court of Appeals for the Fifth Circuit; Hon. Charles Schwartz, Jr.; Jack N. Price

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NO. 88-2016

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

OLYMPIA ROOFING COMPANY, AND OLYMPIA COMPANY, INC., ET AL
Petitioners

v.

THE CELOTEX CORPORATION, STANDARD-TAYLOR INDUSTRIES, INC., STANDARD ROOFING COMPANY OF NEW ORLEANS, INC., ROBBINS TAYLOR, AND PIERRE F. CARRIERE, ET AL
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S RESPONSE TO RESPONDENTS' COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

What criteria are to be employed in determining whether sanctions are impermissibly imposed to deter criticism of judicial misconduct?

Louisiana supports concept of fair play and equal justice under the law. Court should not only be fair and

impartial, but should also appear to be fair and impartial. U.S. v. Garrison, 340 F.Supp. 952 (DC-EDLA, NO Div. 1972). This lawsuit was not filed to criticize nor emphasize judicial misconduct, but rather to request a fair trial, and therefore, no criteria is in place to defeat imposition of sanctions when justly deserved. Petitioners urge that sanctions were misapplied. Parties were not noticed, nor was consent granted to judiciary to invade exhibit boxes placed in registry of Court. Exhibit boxes were not surrendered by the judiciary until October, 1988. There is no judicial "face saving" criteria in place to allow judges to deter fair and equal treatment with imposition of sanctions and penalties. A remand is necessary to try the case as it was postured in December, 1979, upon completion of discovery.

II.

Are the penalties and sanctions imposed on Petitioners in this case unconscionable in light of the lower courts' determinations that Petitioners' claims were frivolous?

Yes! Penalties and sanctions imposed on petitioners were unconscionable if the parties and the judiciary are examining and urging secretive, different and conflicting levels of proof. Since the contents of the exhibits boxes were not in evidence, yet those contents were examined by the judiciary and not the parties to the litigation, it is hard to conceive that a fair trial was realized under any rules of evidence or civil procedure. Case law research and examination by petitioners produced no authorities that would sustain any fair trial concept as realized in this litigation. Contested conduct does not fall within any

acceptable purview of judicial discretion. It is fair to say that penalties and sanctions levied against petitioners pursuant to F.R.C.P., Rule 11, were intimidating and were intended to discourage further investigation by petitioners as to the propriety of trial procedures and subsequent judgments rendered in this litigation.

III.

Are there any circumstances in which examination by the judiciary of trial exhibits filed under seal could prejudice a party's constitutional right to a fair trial, and, if so, are those circumstances present here?

Yes! Petitioner's constitutional right to a fair trial can only be realized by equitable conduct of the judiciary. As cited in Nelson v. United States, 208 F.2d 505, 513 (CA-DC 1953), writs denied, attorney at bar cannot dictate nor correct biased judicial conduct - attorneys can only object

provided they had notice of judicial misconduct which misconduct was not known by Petitioners until October, 1988, when the exhibit boxes were returned to the petitioner. On the other hand, civil contempt of attorneys (which is not present here) may be predicated on a judicial finding of "clear and convincing" evidence that there was a lawful order given with subsequent violation thereof. Attorney's willfulness is not an element of civil contempt. 18 USCA, paragraph 401(1). Civil contempt assessment is remedial in nature in that it is brought to compel obedience to a court order. Once compliance has been achieved, civil sanctions are no longer necessary or appropriate. United States v. Greyhound Corporation, (DC-Ill. 1973) 363 F.Supp. 525, 570. Sanctions are not proper if

judiciary is at fault. Now F.R.C.P., Rule 11, has come on the scene with imposition of sanctions that intimidate and are growing more aggressive against attorneys before the bar. In this litigation, courts were informed that record was incomplete. Imposition of Rule 11 sanction further discouraged any Petitioners' pursuit of that issue. A judge can examine documents and exhibits entered into evidence in camera upon notice and presence of parties. To act otherwise, judge may well be rendering a private advisory opinion to one party to the litigation by the very nature of his rulings from the bench or, worse yet, may be swayed by what he sees or reads in and from exhibit boxes without petitioner's input or correlative linkup of the documents to the issues to be determined at trial. The exhibit boxes were a

prohibited mine field, off limits to inspection, and therefore, the petitioners have been denied a fair trial.

IV.

Does the failure of a Clerk of Court to timely return exhibits in accordance with Local Rules of Court violate the constitutional guarantee against unreasonable searches and seizures?

Yes! Failure of District and Appellate Judiciary to return petitioner's exhibits placed in registry of District Court, but not entered as evidence, necessary to resist summary judgment with subsequent appeals being adjudged frivolous, violates constitutional guarantees against unreasonable searches and seizures when judiciary examined the exhibits without notice to parties nor in response to any motion, hearings, orders, or minute entry as is customary in notice pleadings in

Federal Court. None of the parties to this litigation granted permission to judiciary to examine exhibits and contents of exhibit boxes placed in registry of Court. Respondents' counsels are in error in asserting exhibits were properly designated as "trial exhibits". Discovery was realized by Court Order and documents surrendered by all parties, subject to Protective Orders, were both personal and business records, all being placed in the registry of the Court and not introduced into evidence. Exhibits comprising in excess of 2,000 pages were placed in five (5) sealed exhibit boxes. Although petitioners continually demanded a complete record of the proceedings, respondents (Celotex and Standard Roofing, et al) never requested the Court to return their documents submitted pursuant to discovery orders. Trustee of

Johns-Manville Sales Corporation, debtor in bankruptcy and a non-party, never requested the Court to return their documents submitted pursuant to discovery orders. U.S. Constitutional Amendment 5 controls Federal actions directed to abuses of constitutional guarantees and due process. Further, unreasonable searches and seizures are provided in U.S.C.A. Const.Amend 4; Bell v. Hood (DC-SD Cal 1947) 71 F.Supp. 813, 816. If the Court saw fit not to return the exhibits to any parties, the Court cannot reserve and retain said exhibits for their own use without notice, conference and/or hearing on such an action. Constitutional guarantees against unreasonable searches and seizures applies with equal force to the executive, legislative, and judicial actions. USCA Const.Amend 4; Nelson v.

United States, (supra).

V.

Is a Petition for a Writ of Certiorari filed four years after the Judgment sought to be reviewed timely?

Yes! Timeliness occasions when exhibit boxes were returned to petitioner in October, 1988. It should be noted that none of the defendant respondents, as well as non-party Johns-Manville Sales Corporation (all proponents of Protective Orders) did nothing to have exhibits released by the Court and returned to their respective ownership. In all candor, respondents were distressed that these boxes were surrendered. This litigation was filed on February 5, 1979 and has been in limbo since exhibits were boxed, sealed and placed in registry of the Court in December, 1979. All that transpired from December, 1979 onward was tainted and subject to remand. There is

no definitive date as to when District Court invaded the exhibit boxes. Even if the date of invasion was known, examination of the exhibits without notice to and consent of the parties is invalid, thereby requiring a new trial. Parties made no procedural mistake - the judiciary did; and consequently, petitioners should not be required to submissively accept case dismissal subject to costs and sanctions.

RES JUDICATA
BRUNSWICK CORPORATION V.
PUEBLO BOWL-O-MAT, INC.
429 U.S. 177 (1977)

Respondents' defense is that a definitive judgment has been rendered and that nothing can be urged that would change the outcome. Additionally, many years have passed, and there comes a moment with litigation must cease.

Petitioners urge that judiciary need only

to take a consistent position and re-evaluate their judgment in a fair and equitable fashion. Petitioners urge that exhibits subject to Protective Orders were not available to parties at hearing on Summary Judgment and any appellate procedure. Stated another way, a full record submitted to judiciary was not available to parties. It is proper to cite that two appellate judges of United States Fifth Circuit, that have reviewed petitioners' litigation, namely, Judges Reavley and Williams, have taken a stand in a criminal case before them that is consistent with that being urged by petitioners. In U.S. v. Weintraub, 871 F.2d 1257 (CA 5 Cir. 1989), aforesaid judges concluded that the defendant, Weintraub, would not have been acquitted even if excluded impeachment material been give to him before trial. He was

guilty as charged. However, Weintraub could not be sentenced because the withheld impeachment evidence was not in the record, and this evidence was necessary and material for the judges to determine the length of Weintraub's punishment. That judgment is exactly on point with this appeal. If petitioners were not in possession of, or with access to, exhibits placed in registry of Court, then the judiciary could not rule against petitioners in anti-trust litigation. Petitioners request and claim nothing more than a complete and full record, with exhibits, is in order to prevail at trial, and that remand is indicated. Stated another way, we start over.

REASON WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

I.

Petitioner's objections to the

manner and mode of procedure pursued in this case at both District and Appellate level is nothing more than protest to have the opportunity for a fair hearing and due process. Due process of law, in the due course of legal proceedings and according to the rules and forms which have been established for the protection of private rights, refers to laws which hear before it condemns, and which proceeds upon inquiry and renders judgment only after trial. King v. Brown, 115 So.2d 405, 410 (La.App. 2 Cir. 1959); Tang Tun v. Edsell, 223 U.S. 673, 681, 32 S.Ct. 359, 363, 56 L.Ed. 606; Bilokumsky v. Tod, 263 U.S. at 157, 44 S.Ct. 54, 68 L.Ed. 221. The issue of in camera inspection by judges of petitioners' exhibits not in evidence, without notice, and without any motion for hearing by parties, is not addressed

in the case law of Louisiana, and the absence thereof is urged by petitioners as unreasonable searches in violation of constitutional guarantees. In camera inspection is not a art form, but a discovery device to establish facts and truths. Louisiana Courts have followed Federal Courts discovery rules, and consistent therewith, have determined that in camera inspection by trial court is approved to determine whether party attorney's file contained discoverable material. Hodges v. Southern Farm Bureau Casualty Ins. Co., 433 So.2d 125 (La. 1983); LSA-C.C.P. art. 1422, et seq.; Venable v. Smith, 529 So.2d 888 (La.App. 3 Cir. 1988). Issues presented in the aforementioned insurance and compensation cases respectively address the right of the insured or injured plaintiff to discover, in camera, portions of the

defendant's file prepared by defendants either after the accident or in preparation of anticipated litigation. Denial of this procedural tool of discovery might unfairly prejudice plaintiff's preparation of claim, thereby causing undue hardship or injustice. Discovery is a procedural concept extended to parties - not judges or magistrates. The aforesaid citations are not the scenario before this Court. Discovery was completed (shut off); petitioners' exhibits were sealed and placed in registry of the Court; no motions were filed by parties to examine the contents of exhibit boxes; neither orders nor notices were entered into the procedural record by District or Appellate judiciary that seals of the exhibit boxes (material, but not in evidence) were to be broken and examined

privately by the judiciary. Additionally, impounded exhibit boxes were not released to any parties for trial or appellate preparation and briefing. Liberality of discovery is extended by this Court to parties and experts and cannot be expanded to free examinations of exhibits, not in evidence, by judges without notice and consent. Versed another way, invasion of privacy and unreasonable, as well as unauthorized, searches occurred to the petitioners' detriment.

II.

Bearing in mind this litigation was tainted with ill practices from December 15, 1979 forward and request for a new trial is based on allegations of petitioners' original and amended complaint prior to that date, therefore the holdings of Brunswick Corp. v. Pueblo

Bowl-O-Mat, Inc., 429 U.S. 477 (1977) are not controlling. Petitioners were denied pricing by Celotex to bid Chem-Ply re-roofing of Southern University Mini-Dome in Baton Rouge, Louisiana. Loss of anticipated profit was not speculative as petitioners had profitably performed services on this job once Standard Roofing was placed in default. Coupled with restraint of trade, Celotex breached its contract with petitioners. Conspiracy of defendants to discredit petitioners was documented. There were cognizable damages realized. The length of this litigation is not the fault of petitioners. Once invasion of exhibit boxes was ascertained, prescription began to run from October, 1988 when Court surrendered the five exhibit boxes. Defendant-respondents urged that summary judgment was proper, being based on

submitted pre-trial statement. Petitioners contend that summary judgment cannot be sustained if the Court examined exhibits after December 15, 1979 not in evidence and without notice or hearing. A full and complete record was never established.

CONCLUSION

Violation of U.S. Constitution Amendments 4 and 5 have occasioned. Petition for Writ of Certiorari should be granted with subsequent remand and new trial from posture of case in December, 1979, with completion of discovery and submittal of new pre-trial statement necessary to govern conduct of trial.

Respectfully submitted,

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7-19-89

S.L 1 PAGE 1 2

Supreme Court, U.S.
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NO. 88-2016

In The
Supreme Court of the United States
October Term, 1988

OLYMPIA ROOFING COMPANY, AND
OLYMPIA COMPANY, INC., ET AL
Petitioners

v.

THE CELOTEX CORPORATION,
STANDARD-TAYLOR INDUSTRIES, INC.,
STANDARD ROOFING COMPANY OF
NEW ORLEANS, INC.,
ROBBINS TAYLOR, AND
PIERRE F. CARRIERE, ET AL
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 84-3181

USDC #CA 76-373-A

SUPPLEMENTAL BRIEF IN SUPPORT OF ORIGINAL PETITION FOR WRIT OF CERTIORARI

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Petitioners

LIST OF PARTIES AND OTHERS

Pursuant to Supreme Court Rules 21.1(b) and 28.1, counsel for the Petitioners certifies that the following list of persons or corporations either have an interest in the outcome of this case or were parties to the proceeding in the Court whose judgment is sought to be reviewed.

Petitioners/Plaintiffs/Appellants

1. Olympia Company, Inc.
2. Olympia Roofing Company

Non-Party/Petitioners' Counsel

3. W. J. Manion

Respondents/Defendants/Appellees

4. The Celotex Corporation
5. Standard-Taylor Industries, Inc.
6. Standard Roofing Company of New Orleans, Inc.
7. Robbins Taylor
8. Pierre F. Carriere

Others

9. Johns-Manville Sales Corporation
10. Clerk, U.S. Civil District Court, Eastern District of La.
11. Clerk, U.S. Court of Appeals for the Fifth Circuit
12. Hon. Charles Schwartz, Jr.
13. Jack N. Price

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STANDARD ROOFING COMPANY OF
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ROBBINS TAYLOR, AND
PIERRE F. CARRIERE, ET AL
Respondents

SUPPLEMENTAL BRIEF IN SUPPORT OF ORIGINAL PETITION FOR WRIT OF CERTIORARI

Plaintiff - petitioners respectfully submit this Supplemental Brief in Support of Petition for Writ of Certiorari. A recent case, Standard Roofing Company of New Orleans v. Elliot Construction Company, Inc., et al, 535 So.2d 870

(La.App. 1 Cir. 1989); writs denied February 17, 1989, supports this Supplemental Brief.

REASONS FOR GRANTING WRIT

The defendant-respondents cited in this application for Writ of Certiorari are the same defendants that spawned the original litigation in question, docketed as No. 76-373A, United States District Court, Eastern District of Louisiana.

Aforesaid defendant-respondents have come to court with unclean hands and have been adjudged to be equally at fault in the substandard work performance causing a leaking roof on Mini Dome based on faulty specifications of manufacturers.

I.

Petitioners (hereinafter "Olympia") were designated by architect in Fall of 1974 to evaluate the leaking new roof (Chem Ply) as installed by Standard

Roofing Company of New Orleans, Inc. ("Standard") on Louisiana Mini Dome, Southern University, Baton Rouge, Louisiana ("Dome"), and determined the cause of roof's wrinkled appearance. Further, Olympia was requested to submit a proposal to remove and re-install a new Chem Ply roof on Dome.

Architect and general contractor ("Elliot") were told by Olympia that dampness existed within erected, but incomplete, Dome structure, and that internal air conditioning was required to dry out building before a new roof could be installed. To have a functioning air conditioning system, four (4) low profile canopies attached to Dome had to be completed. This Olympia did for the sum of less than $41,000.

Olympia was not awarded contract to re-install Chem Ply roof. However, in

the course of re-roofing Dome, it was proven that roof could not be applied to wet deck without a wrinkled appearance unless air conditioning system was operating (Appendix A-42, Note 5). Based on this construction procedure alone, none of the parties to litigation cited in 535 So.2d 870 (supra) wanted Olympia on the construction site or in court as an expert.

II.

Without records and exhibits placed in registry of Court available to plaintiff-petitioners at district and appellate levels, petitioners herein could not prevail successfully and avoid Summary Judgment dismissal. In compensation and reconvention cases, Louisiana observes the Latin maxim: Spoliatus Debet Ante Omnia Restituti: "a party despoiled [forcibly deprived of possession] ought

first of all be restored", Tolbird v. Cooper, 143 So.2d 81 (La. 1962), Note 4.

Since Court retained possession of exhibits and refused to release same, petitioners were forcibly deprived of possession, and the spoilation principal and maxim should be applied in this case.

Conversely, Federal government protects documents in their custody from concealment, destruction or removal (18 USCA, paragraph 2071), but there is no legal remedy, except mandamus, for the general public if abused by illegal seizure or concealment.

Finally, Olympia had a constitutional right of access to exhibits in custody of Clerk of Court. Title Research Corp. v. Rausch, 450 So.2d 933; LSA-Const. art. 12, paragraph 3; LSA-R.S. 44:31, 32(a), 33, and 34; LSA-C.C.P. art. 251.

CONCLUSION

Olympia was used by Elliot to determine the errors committed, and suggested corrections needed, relative to leaking wrinkled Chem Ply roof installed by Standard on Dome. None of the parties cited in 535 So.2d 870 found any comfort in Olympia's recommendations, yet those suggestions were ultimately fulfilled.

The conspiracy of Standard and Celotex, coupled with constitutional violations by judiciary personnel in denying Olympia access to exhibits placed in registry of Court denied Olympia an opportunity to prove its anti-trust case as originally filed.

For the foregoing reasons, it is urged that Writ of Certiorari be issued; reversal and remand of this litigation to

District Court is urged by plaintiff-petitioners herein.

Respectfully submitted,

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Attorney for Plaintiff-Petitioners

CERTIFICATE

A copy of this Supplemental Brief in Support of Original Petition for Writ of Certiorari has been mailed to counsel for parties herein.

W. J. MANION

APPENDIX A

535 So.2d 870

STANDARD ROOFING COMPANY OF NEW ORLEANS

v.

ELLIOTT CONSTRUCTION COMPANY, INC., et al

No. 87 CA 0506

Court of Appeal of Louisiana, First Circuit.

August 22, 1988.

As Amended Nov. 30, 1988.

Writs Denied Feb. 17, 1989.

Roofing subcontractor brought action against general contractor to recover balance owed on subcontract to place roof on mini dome of public building. General contractor reconvened against subcontractor and State based on necessity of replacing first roof and associated delays. Subcontractor filed third-party demands against architect,

manufacturer of roofing system, and State. Architect filed third-party demand against State and manufacturer. Other demands were filed by various parties. The Nineteenth Judicial District Court, Parish of East Baton Rouge, C. Lenton Sartain, Jr. ad hoc, rendered judgment against subcontractor and in favor of general contractor, and claims against other parties were dismissed. Subcontractor appealed. The Court of Appeal, Carter, J., held that: (1) subcontractor's substandard work performance was primary cause of leaking roof; (2) manufacturer that required continuous base sheet design for roof was responsible for wrinkled appearance; (3) leaks and wrinkles would have separately required replacement of roof; and (4) subcontractor was entitled to contribution from manufacturer.

Affirmed in part, reversed in part, and rendered.

1. States - 108 1/2

Evidence established that roofing subcontractor's substandard performance was primary cause of leaking roof on mini dome of state building and that it required replacement of entire roof, and, thus, subcontractor was required to bear burden of damages incurred due to leaking roof, even though architect's design defects and contractor's construction defect contributed to leaking problems in valley; subcontractor failed promptly and properly to seal laps, used wet materials, and improperly stored roof covering; and no evidence showed amount of damages related only to problems in valley caused by errors

attributable to architect and general contractor.

2. **States** - 108 1/2

Evidence established that use of continuous base sheet over tectum boards caused wrinkles in roof covering of mini dome on state building and that manufacturer of sheet was responsible for wrinkled roof and resulting costs incurred by general contractor, even if general contractor's negligent storage of tectum caused need to apply continuous base sheet; manufacturer required continuous base sheet design over entire roof whether or not factory-applied felt and tectum had to be removed.

3. **States** - 104

Architect that contracted only with State had no contractual

obligation to general contractor or roofing subcontractor.

4. **Torts** - 20

Project architect may be subject to tort action by subcontractor that is not in privity, if there is breach of duty owed independently of contract between owner and architect.

5. **Negligence** - 10

Architect is deemed to know that services are for protection of owner's interest, as well as protection of other third parties who have no supervisory power whatsoever and must rely on architect's expertise in providing adequate supervision, plans, and specifications.

6. **Negligence** - 1

Architect that allowed continuous base sheet design on mini dome of state building and thereby contributed

to wrinkled roof did not breach any duty to general contractor and roofing subcontractor, where architect relied on procedure established by manufacturer of base sheet and approved by contractor, and where architect never issued written change order adopting continuous base sheet design as part of plans and specifications.

7. **Contracts** - 181, 196

Obligations of roofing subcontractor and manufacturer of roofing system were several, and, thus, subcontractor and manufacturer did not have any solidary obligation; subcontractor was bound to perform subcontract in workmanlike manner; and manufacturer was bound to provide roofing system that was appropriate for mini dome and to provide proper

installation instructions. LSA-C.C. art. 1787; art. 2078 (Repealed).

8. **States** - 109

Evidence established that leaks and wrinkled appearance would have separately required replacement of roof on mini dome of state building, and, thus, roofing subcontractor which was responsible for leaks and roofing system manufacturer which was responsible for wrinkled appearance were obligated to pay for cost of repair.

9. **Contribution** - 6

Roofing subcontractor which was responsible for leaking roof on mini dome and had paid out total obligation to repair it was entitled to contribution from roofing system manufacturer which was responsible for wrinkled appearance, where leaks and

wrinkled appearance would have separately required replacement of roof. LSA-C.C. arts. 1787, 1804; arts. 2078, 2104 (Repealed).

10. **Indemnity** - 13.3

Roofing subcontractor which was responsible for leaks in roof of mini dome was not entitled to indemnity from roofing system manufacturer for attorney fees and costs. LSA-C.C. art. 2545.

11. **Contracts** - 320

Roofing subcontractor was not entitled to recover amount due under contract with general contractor for public building, where subcontractor's work caused leaking roof and was so defective as to be practically useless.

12. **States** - 109

Evidence established that costs

to replace leaking and wrinkled roof on mini dome of public building, except repainting of tectum due to water stains, were caused by roofing subcontractor that was responsible for leaks and roofing system manufacturer that was responsible for wrinkles, and, thus, subcontractor and manufacturer were solidarily liable for all amounts other than cost to repaint tectum deck.

Jack Alltmont, New Orleans, for plaintiff-appellant Standard Roofing Co. of New Orleans.

Douglas Kewley, Metairie, for third party plaintiff-appellant Celotex Corp.

John C. Miller, Baton Rouge, for third party defendant-appellant August Perez and Associates.

Gordon A. Pugh, Baton Rouge, for defendant-appellant Elliott Const. Co.

Daniel Atkinson, Baton Rouge, for third party defendant-appellant U.S. Fidelity and Guar. Co.

Robert E. Redmann, New Orleans, for defendant-appellee State of La.

Ben Lightfoot, Baton Rouge, for defendant-appellee National Gypsum Co.

Before WATKINS, CARTER and FOIL, JJ

CARTER, Judge.

This is a suit arising from a defective roof installed pursuant to a construction contract. Plaintiff, the roofing subcontractor, appeals the trial court's decision requiring it to pay $309,044.00 to the general contractor and dismissing its third party demands.

The parties to the appeal are: (1) the State of Louisiana (State), the owner

of the building under construction; (2) Standard Roofing Company of New Orleans, Inc. (Standard), plaintiff and roofing subcontractor; (3) August Perez and Associates, Inc. (Perez), the project architect; and (4) Celotex Corporation (Celotex), the supplier of the roofing system. Elliot Construction Company (Elliot), the general contractor, also appealed, but then settled its claims with Standard and Standard's surety/ insurer, United States Fidelity and Guaranty Company (USF & G). Elliot and USF & G assigned to Standard all rights on appeal against third parties.

The State contracted with Elliot, as general contractor, and Perez, as architect, for the construction of the Community Educational Assembly and Athletic Center (minidome) on the Baton Rouge campus of Southern University.

Elliot subcontracted with Standard to provide the labor and materials necessary to install the roofing system on the domed roof. Standard purchased the roofing system materials specified in Perez's plans and specifications from Celotex.

After Standard applied the recommended roofing system to the major portion of the domed roof, Perez rejected Standard's work for failure to follow plan specifications. The rejection was based on two problems - the roof's failure to be watertight and its wrinkled appearance.

A second roofing subcontractor was hired and applied Celotex's roofing system following all plan specifications. Prior to completion, it became apparent that the second roof, although watertight, also had an unacceptable

wrinkled appearance. After changes were made in installation procedures, the roof's appearance was deemed acceptable, and it was completed.

Initially, Standard sued Elliot and Aetna Casualty and Surety Company (Aetna), the insurer of Elliot's construction bond, for the $81,886.60 balance allegedly due under its roofing subcontract. Elliot reconvened against Standard and the State seeking damages based on the necessity of replacing the first roof and the associated delays. Standard filed third party demands against the following parties: (1) the project architect, Perez; (2) National Gypsum, the manufacturer of the roof decking referred to as tectum; (3) Celotex, the supplier of the roofing system; and (4) the State. Elliot filed a reconventional demand against Standard

and USF & G and third party demands against: (1) the State; (2) National Gypsum;[1] and (3) Celotex. Perez filed a third party demand against the State and Celotex. Numerous other demands were filed by the various parties.

The district court rendered judgment against Standard and in favor of Elliot in the amount of $309,044.00 for damages caused by Standard's breach of the roofing subcontract. USF & G was found solidarily liable with Standard for the limits of its performance bond. The claims against all other parties were dismissed. Standard appeals the judgment in favor of Elliot, as well as the dismissal of its original action and

---

[1] All claims against National Gypsum were dismissed during the trial.

third party demands.[2] Standard is also asserting the rights of Elliot and USF & G obtained through assignment, against the State and Celotex. Standard seeks to recover in whole, or in part, the amounts for which it was cast by the trial court, together with the amount allegedly due under its subcontract. Additionally, Standard seeks reimbursement of attorney's fees and costs from Celotex based upon the redhibitory defects in the roofing system.

The issues on appeal are as follows:

(1) The parties responsible for paying the costs incurred in replacing the roof and the basis of that responsibility;

---

[2] Elliot and USF & G also filed appeals.

(2) The damages incurred in replacing the roof; and

(3) Standard's right to reimbursement for attorney's fees and costs from Celotex under the theory of redhibition.

FACTS

In February of 1972, the State of Louisiana, through the Capital Outlay Budget Board, Division of Administration, (State) entered into a contract with Elliot for the construction of the minidome. The minidome was described by the trial judge in his written reasons for judgment as follows:

> The Mini-Dome is a large circular building. The dome affect (sic) is created by the roof structure. It consisted of thirty-two (32) metal beams, also referred to as ribs or rib beams. These

beams extended from a tension ring just below the top of the interior side of the exterior wall upwards to a compression ring at the top of the dome. A series of metal purlins between each rib lent lateral support to the rib beams and the two constituted the frame work upon which the decking and the roofing material were to be placed.

The rib beams each consisted of six sections fabricated end to end to give the beam the desired arch. With the beams all in place and viewed from the top, the corresponding end of each section of each beam formed a series of rings and were referred to as such. There were seven such rings, commencing with the compression ring at the top (Ring 1) down to

the end of the last section of the beam at the interior wall (Ring 7). The area at Ring 7 and the interior wall throughout the circumference of the building was referred to as the valley. The area between each rib beam was referred to as a bay of which there were thirty-two (32). At the bottom of the alternate bays were located downspouts. The roofing material was installed in horizontal fashion in each bay from the bottom of the dome to the compression ring.

According to Perez's plans, a product known as "tectum" was laid on top of the beams and purlins by Elliot to form the roof deck. Tectum, which is manufactured by National Gypsum, is a composite board, resembling shredded wheat, and composed of shredded wood-type material compressed

into boards and cemented together. It is approximately three inches thick and, as per the dome plans, came with a factory-applied felt (roofing paper) on what was to be its outer surface.

Standard was then to glue the roof covering, known as "Chem-Ply", to the tectum's factory-applied felts in horizontal strips with an epoxy adhesive. Chem-Ply, which is manufactured by Celotex, is a white, vinyl-like sheet material with a foam-backing. It was purchased and provided by Standard.

While the minidome was in the design phase, a representative of Celotex contacted Perez and suggested the use of Chem-Ply over a tectum base for the roof of the minidome. The correspondence further touted Chem-Ply's performance in handling expansion, contraction, and other distortions affecting roofing

systems. This system was subsequently adopted by Perez, and Celotex's representative worked with Perez in arriving at an overall specification for the deck assembly.

The job specifications called for the contractor to obtain from Celotex a roofing surface guarantee or bond under which Celotex would guarantee against defects of materials and workmanship and maintain the roof in a watertight condition for ten years. As a result, Celotex had to be satisfied with the quality of the materials and workmanship so that it would ultimately issue the bond.

Elliot began construction on the minidome in March, 1972. Standard was not called to begin work on the job until the summer of 1974. An initial meeting was held on May 30, 1974, and attended by

representatives of Elliot, Standard, and Celotex. At that meeting it was noted that Elliot had stored about 25% of the tectum directly on the ground, covered by visqueen. The substantial humidity underneath the visqueen had caused the loosening and wrinkling of the factory-applied felt on some of the tectum. All parties agreed that the tectum could not be used in its deteriorated condition.

Celotex advised that the tectum should be replaced or that the wrinkled, factory-applied felt should be removed and a continuous base sheet of #33 coated felt applied to the tectum with an SIS adhesive.[3] The Chem-Ply would be applied

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[3] The new base sheet was a significant change in that it would be continuous from one plank of tectum to the next, bridging the joints between the tectum boards. The testimony revealed that in 1971, Celotex began requiring the use of a continuous base sheet on all of its jobs. However, it did not relate

to the base sheet with an epoxy adhesive. Celotex further noted that the base sheet would protect the tectum, as well as minimize surface irregularities. See Appendix A attached. Standard submitted an additional cost estimate for $14,050.00 to apply the continuous base sheet, and Elliot paid for the additional work.

On July 23, 1974, Standard commenced work on the job. At that time, Elliot had already laid tectum in eight bays. Standard split its crews into two groups - one to apply the base sheet to the tectum and one to apply the Chem-Ply to the base sheet. Elliot decided to leave open the compression ring, a twenty (20) foot diameter circle in the center of the

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this change to anyone involved with the minidome project until it was discovered that the tectum felts were unusable.

dome, for light and ventilation purposes.

The trial judge described the method of applying the Chem-Ply as follows:

> The Chem-Ply arrived in boxed rolls. It is 36 inches wide and generally 71 feet in length, although some Chem-Ply arrived in varying lengths. The foam backing covers only 34 inches leaving two inches for overlapping of the previously laid sheet. The overlapping edge is referred to as the selvage lap. There is no overlapping of the Chem-Ply where the end of one sheet joins the end of the next sheet. These are referred to as butt joints. Once the Chem-Ply is laid over the field epoxy, a "Tarzan" roller is used to add the epoxy-coated base sheet. A caulking adhesive is used to seal

the selvage laps and to adhere a four inch flashing tape over the butt joints. The selvage lap is wiped clean of any foreign material with a special solvent, allowed to dry, the caulking adhesive is applied beneath a two inch lap with a gun designed for this purpose, and the lap rolled with a wallpaper roller to insure complete embedment. The four inch flashing tape is adhered to the butt joints in similar fashion. After the entire roof is covered, it is mopped with a surface coating to remove any marks and to give it a fresh appearance. This surface coating material has no waterproofing capacity.

On August 6, 1974, the application of the Chem-Ply roofing was about 55%

completed. Ron Pilgrim, the Construction Administration for Perez, stated in his report for that day that the quality of the installation did not appear acceptable and made references to wrinkles in the Chem-Ply. He further indicated that the Chem-Ply roofing material was being stored on the roof by Standard and was subjected to constant wettings by rains, even though the job specifications required that it be stored in a dry, cool place.

A report of Joel Grayson of the Facility Planning and Control Department of the State, dated August 14, 1974, also indicated that workmanship on the roof seemed to be lacking and that there were many "ridges, wrinkles and areas not glued down." By that date, Standard had roofed 29 of the 32 bays.

On August 29, 1974, a roof inspection

meeting was held on the roof to discuss specific problems, including: (1) bulging base sheet at the tectum joints; (2) water trapped under Chem-Ply roofing; and (3) Chem-Ply being installed in a wet condition. The parties viewed workers rolling the Chem-Ply seams in an effort to force out the water underneath. Standard's representative contended that the expanding tectum was causing the bulging of the newly applied felts at the tectum joints.

Celotex's representative, Coleman Curtis, stated that the water under the Chem-Ply would continue to evaporate at the open-end seams and that the remaining water would be released if the selvage seams were turned back, dried and sealed. he further indicated that the balance of moisture left in the Chem-Ply would be vented to the interior of the structure

"because of the nature of the felts." He felt that the water was not a problem and disputed that the Chem-Ply was being installed while the back foam was wet.

Celotex and Standard's representatives asked that they be allowed to finish the job before any final decision was made regarding rejection of the roof. Perez responded that the job would continue, but that the roof would not be accepted with the various bulges and wrinkles.

On September 4, 1974, Perez's representative notified Elliot that it was withholding payment of $47,509.00 related to roof work. On September 13, 1974, Elliot informed Standard that payment would not be forthcoming until "a resolution of the existing problem with your work is reached."

On September 19, 1974, Ron Pilgrim and Robert Landry (Perez), Charles Peterson

(Standard), Pete Torrence (Elliot), and Coleman Curtis (Celotex) inspected the roof. Pilgrim made the following notations in his report: the roof was still unsatisfactory; there was a large bubble under the roofing about 2' x 2' in size; the tectum was flat but the base sheet had buckled; there was very little adhesion between the felt and tectum; inspection holes showed moisture trapped in the tectum and on the underside of the Chem-Ply. The group resolved that Standard would remove the ridges in the roof in a sample area by cutting them out and patching the Chem-Ply roofing over the cutout portions. That area would then be reinspected.

On September 23, Pilgrim noted a number of places where brownish water was seeping from between the horizontal laps and trickling down the surface of the

roof. He further noted that the joints in the valley were in poor condition-loosening and cracking. The condition of the roof in September was substantiated by the testimony of Robert Landry, a field representative for Perez, and Ronald Robert, whose company was employed by Elliot to expedite the minidome project.

On September 25, 1974, another meeting was held with representatives from the State, Elliot, Standard, Celotex and Perez. Elliot instructed Standard to make an official reply as to what action it and/or Celotex would take to resolve the problems. Following the meeting, Standard asked Celotex for technical information with which it could respond to Perez's objections. W.W. LeGrow of Celotex responded that he would obtain technical assistance and also noted,

referring to the wrinkles, that Chem-Ply always follows the outline of the substrate to which it is attached.[4] He further stated that the completed coated section of the roof looked good from the ground.

On or about October 4, 1974, Perez confirmed the rejection of the roof due to Standard's failure to follow application specifications. It required that corrective action be taken by October 15, 1974, and continued until the roof was made acceptable. Standard did not man the job after October 2, 1974, and responded to the rejection with correspondence indicating that the

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[4] Celotex later responded that it had no responsibility for the job because the primary complaint was with Chem-Ply's appearance and that it had warned the parties that the use of the continuous base sheet would not completely eliminate "telegraphing or buckling of felt skins and ridging at the Tectum joints."

problem was with the "deck under-layment" rather than its work. It further stated that the roof was applied in accordance with specifications, Celotex found it had met all bonding requirements, and Elliot was in default of its contract with Standard.

A final effort to resolve the problem was made at a meeting held on November 13, 1974. Standard's representative stated that it would cut out the wrinkles at the joints to resolve the problem with the Chem-Ply's appearance. The State, Perez, and Elliot agreed to give Standard the opportunity to correct the problems.

Following the meeting, representatives from the State, Celotex, Perez, Elliot, and Standard inspected an area where the joints had previously been cut, the base sheet removed, and the Chem-Ply glued directly to the tectum. Those joints

remained in acceptable condition. The joints covered by base sheet and Chem-Ply continued to bulge upward. The State's representative indicated that if all bulges were cut, the entire roof would be patched at the perimeter of every tectum sheet. The State decided it would not accept a new roof which was patched to that extent.

On November 15, 1974, Perez formally notified Elliot that the roof remained unacceptable and that the proposed cutting and patching of the vertical wrinkles would not render it acceptable. The notice further stated that the building continued to sustain damage as a result of water entering at various points. Elliot advised Standard of that decision on November 21, and Standard never returned to the job.

In December, 1974, Elliot closed the

compression ring with tectum and covered the tectum with visqueen and/or loose roofing paper held down with boards and other items. Standard then offered to complete the roof by applying Chem-Ply in the compression ring area. However, Standard's offer was rejected, and Standard filed suit.

In a report dated December 24, 1974, Robert Landry (Perez) reported as follows:

> The majority of the dome roof has been rejected because of wrinkles, there are some possible leaks in the sloped portion of the roof however the main problem as far as water entering the building is at the valley where the lapjoints of the Chem-Ply were made when the material was yet (sic), there was poor adhesion and there are,

consequently, leaks.

In his reports of January, February, and March, 1975, he noted that the temporary visqueen covering over the compression ring was leaking substantially and raised the possibility that water was running into the old tectum.

Elliot, meanwhile, hired Logan Donnel, an engineer specializing in roof problems. Mr. Donnel first visited the job site on March 4, 1975, in an attempt to find a solution that would satisfy the requirements of Elliot, the State, and Perez and meet the bonding requirements of Celotex. He was informed that the roof had been rejected due to its appearance and that there were concerns regarding the ability to make the roof watertight.

Mr. Donnel found as general and typical conditions throughout the roof

surface unsealed laps, water entrapped between the Chem-Ply and the base sheet, delamination of foam backing, and wrinkles along the tectum joints. He made seven test cuts at various areas of the roof and in each one found that there was water in the foam backing of the Chem-Ply. The adhesion of the base sheet to the Chem-Ply varied from good to nonexistent. In his opinion, the variations in the adhesion indicated improper workmanship.

The area underneath the valley contained the most serious leaks, but there were other isolated spots in the dome itself and minor leaks around the compression ring. He felt any attempt to correct the superficial defects, such as sealing laps, would result in further deterioration and delamination. He concluded that the tectum decking

remained in satisfactory condition, but the existing base sheet and Chem-Ply would have to be removed and replaced. Donnel felt that significant, systematic wrinkling around the tectum edges was inevitable due to the design used - a base sheet adhered to tectum.

Standard hired its own expert, W.J. Evans, in April, 1975. He initially inspected the roof on May 12, 1975, and found the valley to be in poor condition with standing water and some debris. He estimated that there were fifteen to twenty laps on the domed portion of the roof which were not completely sealed and were emitting water.

On July 18, 1975, he made his first comprehensive inspection of the entire roof. After an additional inspection on August 7, Evans concluded that the principal problems were in the valley and

could be corrected and that it was possible and practical to repair the roof and restore it to worthwhile service.

In September, 1975, Evans was present during the removal and replacement of Standard's roof. He saw considerable water and moisture at the top of the roof and more than he expected in the roof's sloping sides. He testified that as the workers progressed down the roof, the amount of moisture coming off with the materials was increasing until they reached the bottom of the roof where the materials were actually wet.

Evans opined that inadequately or improperly sealed laps could not have caused the amount of moisture he saw in the initial roof. He theorized that the moisture resulted from water vapor rising from the building, through the tectum, and condensating on the underside of the

Chem-Ply. Both experts agreed that the open compression rings, except for its immediate area, was not the source of the moisture found beneath the Chem-Ply in the remaining areas of the roof's surface.

Meanwhile, Elliot was looking for a subcontractor to re-roof the minidome. On June 30, 1975, Elliot contracted with Sechrist-Hall Company of Corpus Christi, Texas (Sechrist-Hall), to perform that service.

A preconstruction meeting for the re-roofing project, attended by all parties to this suit except Standard, was held on September 17, 1975. The parties discussed the plan for the application of the new roof under which all of the felts and Chem-Ply on the dome were to be removed. Elliot was responsible for repairing and replacing any damaged

tectum.

Celotex recommended the application of a parge coating to smooth the bare tectum, followed by SIS adhesive and a base sheet. The recommended base sheet, unlike the one applied by Standard, was non-organic felt and was heavier and made of a better quality. Celotex stated the new base sheet was also less susceptible to dimensional changes. After application, the base sheet was to remain uncovered for one week, by Celotex's orders, to allow the adhesive solvents to dissipate. Sechrist-Hall was then to apply the Chem-Ply using an epoxy adhesive and to seal all laps at the end of each day.

At the meeting, Celotex's production manager stated that the base sheet was needed because it provided a temporary roof to protect the tectum until the

Chem-Ply was applied, that it provided a permanent two-ply, rather than one-ply system, and that it smoothed out existing irregularities in the deck thereby providing a superior finished aesthetic effect.

On September 23, 1975, Sechrist-Hall commenced the re-roofing job. After the application of Chem-Ply to two and one-half rings, wrinkles began to appear on the new roof despite Sechrist-Hall's undisputed exemplary workmanship. On October 21, Sechrist-Hall was told to suspend the work until the problem could be resolved.

In an attempt to remedy the problem, Perez instructed Sechrist-Hall to cut the base sheet in a sample area at each horizontal and vertical joint of the tectum boards, thereby creating a gap in the base sheet outlining each board.

Pursuant to Perez's instructions, the Chem-Ply was glued directly to the tectum in the gap. On November 7, the test area was deemed acceptable by Perez and the State, and on November 21, Sechrist-Hall was allowed to resume its work. The design change proved satisfactory, and the second roof was completed on February 2, 1976.

There were several significant changes in the re-roofing procedure, besides the cutting of the base sheet and the addition of the parge coating and non-organic, higher quality base sheet. Those changes included: (1) increasing the slope in the valleys to correct the problem of standing water; (2) adding a double layer of roofing paper over the concrete in the valley to protect the Chem-Ply from moisture in the concrete; (3) the use of an epoxy adhesive under

the base sheet in the deck of the valley; and (4) application of the roofing system while the air conditioner was on, which reduced the amount of humidity in the air.[5]

During the construction of the minidome, Celotex was having problems with Chem-Ply on other jobs. Due to abnormally high complaints, in 1974 the research department of Celotex's parent company began investigating the problems. Research memoranda from 1974 indicate that insufficient manufacturing processes resulting in premature delamination of the foam backing and a shortened lifetime or resiliency. As a result of the

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[5] The wrinkles on the re-roofing project appeared the day after the building's air conditioner was turned off. The wrinkling reportedly stabilized once the air conditioner was reinstated. The air conditioning was not in use during the initial roofing job.

studies, in March of 1975, Celotex agreed to withdraw the entire Chem-Ply system from the market. Celotex manufactured a special order for the re-roofing project.

TRIAL COURT'S DECISION

The trial court rendered judgment in favor of Elliot and against Standard in the amount of $309,044.00.[6] The award was made up of the following specific items:

(1) Remove roofing and repair deck -	$ 25,453.00
(2) Sub-contractor's charge to replace the roof -	$138,589.00
(3) Roofing consultants -	$ 17,581.00

[6] The court also granted Standard's third party demand against USF & G for $145,002.00, the amount allowed under the comprehensive general liability policy provided Standard and for $30,449.61 in legal defense costs owed under the policy. Due to the settlement, USF & G's liability is not at issue on appeal.

(4) Painting tectum deck - $ 19,247.00

(5) Time related costs - $108,174.00

USF & G was found to be liable in solido with Standard for $141,000.00 of the total liability, the limits of its performance bond. All other claims and demands were dismissed.

In detailed written reasons, the trial court found that Perez and the State were justified in rejecting the roof on the basis of Standard's poor workmanship and that Standard was obligated to make the roof watertight, if possible, before walking off the job.

The trial court accepted the opinion of Logan Donnel, Elliot's expert, that the improperly sealed laps and butt joints were the cause of the high moisture content found under the Chem-Ply and the roof's failure. It further found that Standard's job foreman had no prior

experience with Chem-Ply, did not have access to a Chem-Ply application manual, failed to see that selvage laps and butt joints were properly and promptly sealed, and was of the mistaken belief that the adhesive used to attach Chem-Ply would render the laps and joints watertight.

The court concluded that it need not resolve the issue regarding the State's and/or Perez's prerogative to decline acceptance of Standard's work on the basis of aesthetic grounds, even though there "may be some merit in Standard's claim that is was not responsible for the wrinkles." The court further concluded that it need not address Elliot's claim against Celotex for any breach of express or implied warranties because the wrinkles did not produce the leaks.

LEGAL ANALYSIS

[1] We agree with the trial court's

finding that poor workmanship by Standard was a cause of the leaking dome roof and that Standard should have made the roof watertight, to the extent possible, before leaving the job in October, 1974. While conflicting testimony was presented on the severity of the leaks in the roof and whether the roof could be repaired rather than replaced, there is sufficient evidence to support the finding that Standard was responsible for the waterproofing problems in the sloped portion of the domed roof and that its substandard performance contributed to the leaks occurring in the other areas of the roof.

The overwhelming majority of the testimony indicates that the most severe leaks occurred in the valley. The valley is located where the tectum roof reaches the wall at a steep angle. It was

leveled out by the application of a wedge of lightweight aggregate concrete which was placed at the joint between the wall and the roof.

Standard's failure to promptly and properly seal laps, its use of wet materials, and its improper storage of the Chem-Ply all contributed to the leaks in the valley. However, there was substantial evidence that those leaks were attributable, at least in part, to the fault of Perez and Elliot.

The wedge of concrete in the valley formed a slope which peaked midway between the drains located in every other bay. The slope, as designed by Perez, was inadequate for proper drainage, resulting in standing water in the valley area. During the re-roofing procedure, Sechrist-Hall added more concrete to the valleys to increase the slope and improve

the drainage.

Donnel and Evans testified that Perez's flashing detail along the entire perimeter of the roof was faulty and allowed the leakage of water under the Chem-Ply. The same design detail was used on the re-roofing project and both experts, after visiting the minidome in 1976, reported that the valley still leaked.

Perez's specifications also required that the Chem-Ply be applied directly over the concrete wedge. According to the expert testimony, the water in the concrete evaporated causing adhesion problems with the Chem-Ply. The design was changed on the re-roofing project to provide for a double layer of felt paper over the concrete to protect the Chem-Ply.

Elliot made a construction error when

pouring the concrete for the gutters. The specifications stated that the factory-applied felts were to be removed from the top of the tectum before the concrete was poured. Mr. Donnel testified that this step was important to allow the proper curing and drying of the concrete. However, Elliot did not remove the felts before pouring the concrete. The water in the concrete was trapped between two vapor barriers and, in Donnel's opinion, was the cause of some of the problems relating to the sealing of laps in the valleys.

The preponderance of the evidence supports the trial court's finding that Standard's substandard work performance was the primary cause of the leaking roof and resulted in the replacement of the entire roof. While Perez's design defects and Elliot's construction defect

contributed to the problems in the valley, these defects, in themselves, were not severe enough to require the replacement of the entire roof. Additionally, insufficient evidence was presented to show the amount of damages which relate only to the problems in the valley caused by the errors attributable to Perez and Elliot. Thus, Standard must bear the burden of the damages incurred due to the leaking roof.

However, the roof was not rejected and replaced solely on the basis of the leaks. It was also rejected because of its wrinkled appearance. We cannot ignore the fact that regardless of whether the leaks existed or could have been repaired, the roof had to be replaced due to the wrinkles.

[2] The preponderance of the evidence supports a finding that the cause of the

wrinkles in the Chem-Ply was the use of the continuous base sheet over the tectum boards. The wrinkles appeared even when the base sheet and Chem-Ply were applied with the undisputed superior workmanship of Sechrist-Hall. The testimony of Mr. Donnel indicates that wrinkles on the second roof were a little smaller, but sufficient to require rejection of the roof had the work continued. In his opinion, the wrinkles were inevitable based on the use of the continuous base sheet. We are convinced that Standard's poor workmanship in the application of the base sheet and Chem-Ply did not contribute in any significant manner to the wrinkled appearance. While Standard may be liable technically or constructively to Elliot as the supplier of the Chem-Ply, it is not primarily at fault for the continuous base sheet

design requirement.

The next issue involves determining the party or parties responsible for the wrinkles. The change in the design specifications adopting the continuous base sheet is evidenced by an interoffice memorandum by C.J. Klasen of Celotex's parent company, which describes the basis for that decision as follows:

> Bill LeGrow, Gerry Stanley [other Celotex representatives] and I all agreed that a base sheet should be required over the Tectum although one had not been specified. The base sheet should be applied with SIS Adhesive. The base sheet is required:
>
> A. To cover and protect the Tectum from the weather. National Gypsum requires that all Tectum be covered within 24 hours of installation and there is no way that the CHEM-PLY can

be applied to conform to this requirement.

B. The base sheet will tend to minimize some of the irregularities in the Tectum deck that are anticipated.

C. Celotex now requires a base sheet over all precast decks.

This recommendation was made after it was learned that Elliot had improperly stored some of the tectum and the factory-applied felt was wrinkling.

Elliot accepted the recommendation from Celotex and adjusted its contract with Standard to pay for the additional work. Ron Pilgrim of Perez testified that Perez also agreed to abide by the recommendation of Celotex, although it had no idea that the base sheet would cause a new problem. However, Perez never issued a change order implementing the change into the original

specifications. Perez, Standard, and Elliot all felt that Celotex's recommendation had to be followed in order to obtain a bonded roof from Celotex.

[3] If the State was bringing an action against Perez to recover for its cost to replace the roof, we have no doubt that Perez would be cast as a party responsible for the wrinkles under the provisions of its contract. That action would be based on Perez's contractual obligations to oversee and supervise the project. However, in this suit, we consider only Standard's right to indemnification or contribution from Perez pursuant to its third party demand. Perez contracted with the State only and has no contractual obligation to Elliot or Elliot's subcontractor, Standard.

[4,5] However, Perez, as the project

architect, may be subject to an action in tort brought by Standard even in the absence of any privity of contract.[7] Such an action arises when there is a breach of a duty owed independently of the contract between the owner and architect. See Gurtler, Hebert & Co. v. Weyland Mach. Shop, 405 So.2d 660 (La.App. 4th Cir. 1981), writ denied, 410 So.2d 1130 (La. 1982); Calandro Development Inc. v. R.M. Butler Contr., Inc., 249 So.2d 254 (La.App. 1st Cir. 1971). An architect is deemed to know that his services are for the protection of the owner's interest, as well as the protection of other third parties who have no supervisory power whatsoever and must rely on the architect's expertise in

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[7] There is no evidence in the record on appeal which indicates that Elliot filed a third party demand against Perez.

providing adequate supervision, plans, and specifications. See Calandro Development, Inc. v. R.M. Butler Contr., Inc., supra.

[6] However, we find that the evidence is insufficient to show that Perez breached any duty owed to Standard or Elliot. Perez never issued a written change order adopting the continuous base sheet design as part of its plans and specifications. It admittedly relied on the procedure established by Celotex and approved by Elliot which made that design change. However, it cannot be faulted for relying on the recommendations of the manufacturer, particularly when it had not been adequately warned about the wrinkling potential of the recommended procedure and when manufacturer approval was required to obtain a bonded roof.

We hold that Perez did not breach any

duty owed to Standard or Elliot by allowing the application of the continuous base sheet.

The argument is made that the use of the continuous base sheet was caused by Elliot's improper storage of the tectum at the job site. However, only 25% of the total tectum was improperly stored, and there was additional testimony that only the tectum boards near the top of the stacks actually had wrinkled felts. Celotex required that the continuous base sheet be applied over the entire roof, whether or not the factory-applied felts on the tectum had to be removed. Celotex required the continuous base sheet on the re-roofing job in areas where there was no problem with factory-applied felts. While Elliot's negligent storage of the tectum may have been a cause-in-fact of the application of the continuous base

sheet, it was certainly not the legal cause. Additionally, Elliot has been dismissed from this proceeding due to settlement and is not a party to this appeal.

The responsibility for the wrinkled roof and the resulting costs incurred by Elliot must be with Celotex, the manufacturer and the party which initiated and required the continuous base sheet design. While the Chem-Ply itself may not have been inherently defective, the application specifications required by Celotex were defective.

Celotex advertised Chem-Ply as a product designed to conform to "exotic-type roofs" which are those that are necessarily visible and become part of a building's architecture. Thus, the aesthetic appeal of such a roof is of obvious importance and the rejection of

any such roof due to its unappealing appearance is entirely proper. This is particularly so in this case where Celotex's sales brochures emphasized the dependability and aesthetic appeal of Chem-Ply.

Once Chem-Ply was selected for the minidome, Celotex representatives worked with Perez in obtaining overall specifications for the deck assembly and the roofing system. When the problem arose with the wet tectum, Celotex required the use of the continuous base sheet, which would allegedly "minimize the irregularities" of the tectum deck. This requirement was made at a time when Celotex, as manufacturer, presumably knew of the wrinkling tendency around the tectum joints. Celotex was the party ultimately responsible for the continuous base sheet requirement, which resulted in

the wrinkled appearance. While the Chem-Ply was not necessarily defective per se, the application specifications required by Celotex were defective.

Although evidence was presented to show that there had been delamination and resiliency problems encountered with the product in general due to inadequate heating during manufacture, that defect was not the primary cause of the wrinkles or the roof's replacement. The cause was the continuous base sheet requirement imposed by Celotex. While Celotex offered an alternative to Elliot-purchasing new tectum - Celotex should not be exonerated because the wrong choice was made.

[7] We must now consider the basis of the liability imposed. Each party at fault - Standard and Celotex - had separate obligations to perform separate

acts. Standard was contractually bound to Elliot to perform its subcontract in a workmanlike manner; Celotex was bound to provide a roofing system that was appropriate for the project and to provide proper installation instructions for its product. Each party promised or was obligated separately to perform distinct acts. The obligations were several in that regard. LSA-C.C. art. 2078[8] (prior to Acts 1984, No. 331, section 1, now LSA-C.C. art. 1787). There was no solidary obligation for the performance of the separate obligations.

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[8] LSA-C.C. art. 2078 (prior to Acts 1984, No. 331, section 1) states: Several obligations are produced, when what is promised by one of the obligors, is not promised by the other, but each one promises separately for himself to do a distinct act; such obligations, although they may be contained in the same contract, are considered as much individual and distinct as if they had been in different contracts, and made at different times.

Town of Winnsboro v. Barnard & Burk, Inc., 294 So.2d 867 (La.App. 2nd Cir. 1974), writs refused, 295 So.2d 445 (1974).

It does not follow, however, that the obligations now owed by Standard and Celotex remain several. The obligation at issue in this suit and the one enforced by Elliot at trial is the payment of damages by the parties responsible for the defective roof due to the breach of their respective contracts and duties. See Town of Winnsboro v. Barnard & Burk, Inc., supra.

[8] Unlike the trial court, we find that the roof had to be replaced because of two problems - it was not watertight, and it was wrinkled in appearance. Each problem was of such severity, that in the absence of the other problem, replacement was necessary. The waterproofing

problems were caused primarily by Standard's substandard workmanship. The wrinkled appearance was the result of Celotex's continuous base sheet requirement. Each problem was sufficient to require a new roof. Both parties' actions combined and contributed to cause the same item of damages, an unacceptable roof, and both parties are now obligated to pay for the cost of repair.

[9] Standard has been compelled to pay the whole amount of damages and payment by Standard exonerates Celotex. However, Standard is entitled to contribution by virtue of its payment of the total obligation. The parties are obligated differently by reason of the various duties and contractual relationships, but they are both bound for the cost of replacing the roof. It matters not that the respective parties'

obligations to repair the loss arise separately from an offense or quasi-offense or from a contract, or both. Reeves v. Dixie Brick, Inc., 403 So.2d 792 (La.App. 2nd Cir. 1981); Town of Winnsboro v. Barnard & Burk, Inc., supra. All of the elements of an obligation in solido are met.

[10] Standard also requests indemnification in redhibition for its attorney's fees and costs by Celotex under LSA-C.C. art. 2545. However, in order for a party to make a claim for indemnification that party must itself be free of fault and liable only vicariously or derivatively. See Robert v. Bayou Bernard Marine, Inc., 514 So.2d 540 (La.App. 3rd Cir. 1987), writs denied, 515 So.2d 1107, 1108 (La. 1987); Landry v. Pierre Part Natural Gas Co., Inc., 413 So.2d 621 (La.App. 1st Cir. 1982); Dupree

v. Pechinay Saint Gobain Co., 369 So.2d 1075 (La.App. 1st Cir. 1979), writ denied, 371 So.2d 1341 (La. 1979). In this case, Standard itself was a fault in providing substandard workmanship. Hence, it is only entitled to contribution from its solidary obligor, not indemnification.

[11] Standard's request for the amount due under its contract with Elliot is also denied because its work was so defective as to be practically useless. Fortier v. Sessum, 441 So.2d 1238 (La.App. 5th Cir. 1983).

DAMAGES

[12] The trial court found that the following damages were incurred by Elliot:

(1) Remove roofing and repair deck — $ 25,453.00

(2) Replace roof (sub-contractor's charge)	138,589.00
(3) Roofing consultant	17,581.00
(4) Painting tectum deck	19,247.00
(5) Time related costs	108,174.00
Total	$309,044.00

Only one of these items, painting the tectum deck, can be attributed solely to the leaking roof. The testimony indicates that the tectum had to be repainted due to water stains. All of the other costs were caused by both problems - the leaking roof and the wrinkled roof.

Appellees argue that the "time related costs" arose due to the delays in interior work caused solely by the leaking roof. However, as the trial court found, delays in interior work were also attributable to the open compression ring, the delayed installation of the

window walls and the lack of air conditioning. The importance of these factors is evidenced by the fact that more than ninety percent of the carpentry work, doors, windows and glass work, finishing work, equipment installation and furnishings were completed by September 21, 1975, within the three month period after the air conditioning was turned on.

The trial court concluded that a reasonable delay period attributable to the replacement of the roof was 132 days or the period from September 21, 1975 through January 31, 1976. The evidence shows that Sechrist-Hall spent its first two or three days (September 23-25) on the job repairing the gutter to make it watertight. From that point on, the trial court found that the interior work could proceed without interruption. The

delay period of 132 days, which the trial court used to calculate "time related costs," was not attributable to the leaking roof. Both parties are solidarily bound for this amount.

Standard has paid the full amount of the liability owed to Elliot. It is now entitled to collect a virile portion or one-half of the damages from Celotex for which there is solidary liability. LSA-C.C. art. 2104 (prior to Acts 1984, No. 331, section 1, now LSA-C.C. art. 1804).

We find that Standard and Celotex are solidarily bound for all costs except the $19,247.00 cost to paint the tectum deck. Standard is solely responsible for that item.

CONCLUSION

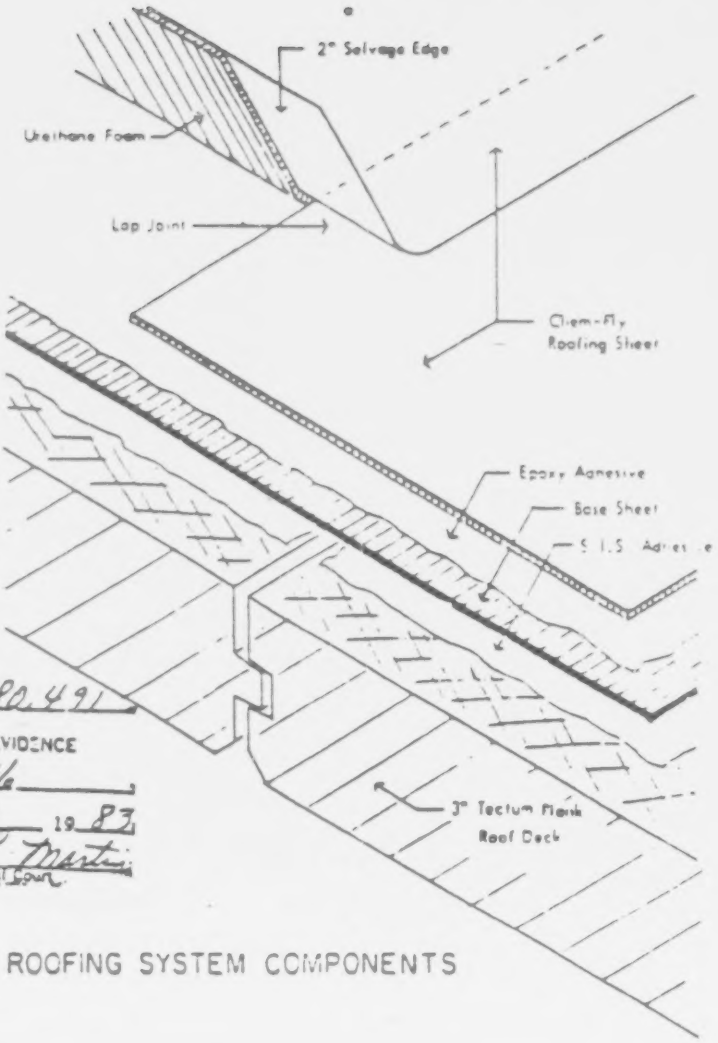
Accordingly, the trial court's judgment finding Standard liable is affirmed. Judgment is rendered in favor

of Standard and against Celotex finding that Standard and Celotex are solidarily liable for $289,797.00, and that Standard is entitled to contribution of fifty percent of the total amount, with judicial interest thereon from the date of payment of the solidary obligation to Elliot by Standard. See Ragland v. Viator, 426 So.2d 231 (La.App. 1st Cir. 1983). The trial court's judgment dismissing all other parties is affirmed. Costs are assessed to Standard and Celotex.

AFFIRMED IN PART; REVERSED IN PART; AND RENDERED.

A-60 a

ILLUSTRATION "E"



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S. L. Martin
CLERK OF COURT

ROOFING SYSTEM COMPONENTS

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Exhibit "A"

MEMORANDUM DECISIONS

In 535 So.2d 1166:

STANDARD ROOFING COMPANY OF
NEW ORLEANS

v.

ELLIOTT CONSTRUCTION
COMPANY, INC., et al

No. 88-C-3143.

Supreme Court of Louisiana.
February 17, 1989.

In re Celotex Corp.; -
Defendant(s); applying
for writ of certiorari

and/or review; to the Court of Appeal, First Circuit, No. 87CA 0506; Parish of East Baton Rouge, 19th Judicial District Court, Div. "L", No. 180491.

Prior report: La.App., 535 So.2d 870.

Denied.

In 535 So.2d 1167:

STANDARD ROOFING COMPANY OF NEW ORLEANS

v.

ELLIOTT CONSTRUCTION COMPANY, INC., et al

No. 88-C-3152.

Supreme Court of Louisiana.

February 17, 1989.

Reconsideration Denied March 10, 1989.

In re Standard Roofing Co. of N.O.; - Plaintiffs(s); applying for writ of certiorari and/or review; to the Court of Appeal, First Circuit, No. CA87 0506; Parish of East Baton Rouge, 19th Judicial District Court, Div. "L", No. 180491.

Prior report: La.App., 535 So.2d 870.

Denied.

MARCUS, J., would grant the writ.

In 539 So.2d 627:

STANDARD ROOFING COMPANY OF
NEW ORLEANS

v.

ELLIOTT CONSTRUCTION
COMPANY, INC., et al

No. 88-C-3152.

Supreme Court of Louisiana.

March 10, 1989.

In re Standard Roofing
Co. of N.O.; applying for

reconsideration of writ denial of February 17, 1989, 537 So.2d 1167, to the Court of Appeal, First Circuit, No. CA87 0506; Parish of East Baton Rouge, 19th Judicial District Court, Div. "L", No. 180491.

Reconsideration denied.

The judgment is definitive. La.C.C.P. art. 2166.